Petition

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

MARSHALL & ILSLEY CORPORATION, M&I MARSHALL & ILSLEY BANK, THE MARINE CORPORATION, MARINE NATIONAL EXCHANGE BANK OF MILWAUKEE, HERITAGE WISCONSIN CORPORATION and HERITAGE BANK MILWAUKEE,
Petitioners,

vs.

JOHN G. HEIMANN, Comptroller of the Currency of the United States, FIRST BANK (N.A.) and FIRST BANK SYSTEM, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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November 20, 1981

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

MARSHALL & ILSLEY CORPORATION, M&I MARSHALL & ILSLEY BANK, THE MARINE CORPORATION, MARINE NATIONAL EXCHANGE BANK OF MILWAUKEE, HERITAGE WISCONSIN CORPORATION and HERITAGE BANK MILWAUKEE, the Petitioners herein, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the above-captioned case on June 12, 1981.

QUESTIONS PRESENTED

1. When an illegal branch bank is created in violation of Wisconsin and federal laws, which results in injury to petitioner banks, did the Court of Appeals err by concluding that competing banks do not have standing to challenge such actions on the ground they are not within the "zone of interests" protected by federal and state laws limiting branch banking?

2. Even if the "zone of interests" test is a requirement for standing in branch banking disputes, did the Court of Appeals improperly apply the test in dismissing a complaint prior to discovery or trial based upon assumptions of fact directly contrary to the facts alleged in the complaint?

3. Even if Wisconsin's failing bank exception could apply in this case, did the Court of Appeals err by interpreting the requirements of this statute, which the Wisconsin courts have not previously considered, in a manner which nullifies important policies and interests protected by the statute and effectively eliminate the statute from the laws of Wisconsin?

4. Did the Court of Appeals incorrectly conclude that district courts do not have jurisdiction to review the illegal actions of the Comptroller of the Currency in approving a bank acquisition which in substance and reality was an acquisition by a bank holding company across state lines?

PARTIES

All of the parties to this proceeding are listed in the caption of the case as set forth on the cover of this petition. Petitioner Marshall & Ilsley Corporation does not have a parent but is the parent of the petitioner M&I Marshall & Ilsley Bank and it has the additional subsidiaries or affiliates, other than wholly owned, as set forth in footnote 1 below. Petitioner The Marine Corporation does not have a parent but is the parent of petitioner Marine National Exchange Bank of Milwaukee and has the additional subsidiaries or affiliates, other than wholly owned, as listed in footnote 2 below. Petitioner Heritage Wisconsin Corporation does not have a parent but is the parent of petitioner Heritage Bank Milwaukee and has the additional subsidiaries or affiliates, other than wholly owned, as listed in footnote 3 below.

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[1] M&I Northern Bank, M&I Silver Spring Bank, M&I Bank of Greenfield, M&I West Suburban Bank, M&I New Holstein Bank, M&I Bank of Adams-Friendship, M&I Bank of Westfield, M&I Bank of Portage County, M&I Peoples Bank, M&I Ripon State Bank, M&I Bank of Mayville, M&I Citizens American Bank, M&I Bank of Watertown, M&I American Bank & Trust Co., M&I Bank of Menomonee Falls, M&I Bank of Mount Pleasant and M&I Fox Heights Bank.

[2] Burlington Marine Bank, Capitol Marine Bank, Commercial Marine Bank, Cudahy Marine Bank, Germantown Marine Bank, Marine Bank of Beaver Dam, Marine Bank Kettle Moraine, Marine Bank Watertown, Marine National Bank of Neenah, Marine Bank National Bank of Waukesha, Oak Creek Marine National Bank, Peoples Marine Bank of Green Bay, Security Marine Bank of Madison, South Milwaukee Marine Bank, Waukesha County Marine Bank, West Bend Marine Bank, Wisconsin Marine Bank and The Marine Trust Company, N.A.

[3] Heritage Bank of Whitefish Bay, Heritage Bank-Mayfair, Heritage Bank of West Bend, Heritage Bank Menomonee Falls, Heritage Trust Company, Heritage Bank Beloit, Heritage Bank Beloit Plaza.

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OPINIONS BELOW

The Opinion of the Court of Appeals herein is reported in 652 F.2d 685 (7th Cir. 1981). It is printed in Appendix A hereto, *infra*, pp. A-1, *et. seq.* Three orders and a judgment of the United States District Court for the Western District of Wisconsin are not officially reported. They are reported unofficially as slip opinions, Case No. 78-C-42, and are printed in Appendix B hereto: order filed June 21, 1978, pp. B-1, *et. seq.*, order filed September 18, 1978, pp. B-5 *et. seq.* and judgment and order, both filed June 30, 1981, pp. B-23 *et. seq.*

JURISDICTION

The Judgment of the Court of Appeals herein was entered on June 12, 1981. A copy of such judgment is set forth in Appendix C hereto, *infra*, at p. C-1, *et. seq.* An Order of the Court of Appeals granting Petitioners' Motion to extend the time to file a Petition for Rehearing was granted on June 26, 1981 and a copy of such Order is set forth in Appendix C hereto, *infra*, p. C-2, *et. seq.* A Petition for Rehearing and Suggestion for Rehearing in banc to the Court of Appeals was denied by Order of such Court on August 26, 1981. This Order is reproduced in Appendix C hereto, *infra*, at p. C-3, *et. seq.* The jurisdiction of the Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

UNITED STATES CODE:

5 U.S.C. §702
5 U.S.C. §704
12 U.S.C. §36(c)
12 U.S.C. §181
12 U.S.C. §1828(c)
12 U.S.C. §1828(d)
12 U.S.C. §§1842 (a) and (d)(1)

STATUTES OF THE STATE OF WISCONSIN:

Section 221.04, *Wis. Stat.*

The foregoing provisions of the United States Code and the Wisconsin Statutes are lengthy and the pertinent portions of their text are set out in full in Appendix E hereto, *infra*, pp. E-1, *et. seq.*

STATEMENT OF THE CASE

This appeal arises out of the granting of the respondents' motion to dismiss. Petitioners were denied any discovery whatsoever. The District Court and the Court of Appeals determined that petitioners lacked standing to pursue these claims. Therefore, as the Court of Appeals correctly concluded, the record is limited to the allegations in the complaint and amended complaint reproduced in Appendix D, *infra*, at pp. D-1 and D-22, *et. seq.*

This litigation results from the acquisition of the assets and the assumption of the liabilities of the former Midland National Bank ("Midland") by defendant First Bank (N.A.) of LaCrosse, Wisconsin ("LaCrosse") and the establishment by LaCrosse of a new branch bank at the former location of Midland in Milwaukee, Wisconsin. LaCrosse is a subsidiary of defendant First Bank System, Inc. ("First Bank System"), a huge bank holding company located in Minneapolis, Minnesota. Both the acquisition and the establishment of the branch bank were approved by defendant Comptroller of the Currency of the United States ("Comptroller").

Petitioners, three separate Milwaukee banks and the bank holding companies that own them, allege that LaCrosse Bank's retention of the former Midland office as a branch bank in Milwaukee and the approval thereof by the Comptroller violated 12 U.S.C. §36(c) and Wis. Stat. §221.04(1)(j). Petitioners further allege that the acquisition of Midland by LaCrosse was actually an acquisition by First Bank System, and thus, a holding company acquisition of a bank across state lines which the Comptroller had no jurisdiction or authority to approve.

Petitioners sought relief by way of a declaratory judgment and injunction from the District Court and alleged jurisdiction in such court on the basis that the case arose out of of the National Bank Act, specifically 12 U.S.C. §§36 and 81, the Bank Merger Act, specifically 12 U.S.C. §1828(c) and the Administrative Procedure Act, specifically 5 U.S.C. §§551, 558 and 702. Petitioners further alleged that the matter in controversy exceeded $10,000 and that jurisdiction was vested in such Court by 28 U.S.C. §§1331, 1346(a)(2) and 2201-2202, and by 5 U.S.C. §§701-706.

Briefly summarized, the pleadings allege that immediately prior to July 23, 1977, the petitioner banks and Midland were located within a radius of one-half mile of each other, in the same city and county. At the time, Midland was the fourth largest bank in Wisconsin. Effective July 23, 1977, LaCrosse, a small bank only one-sixth the size of Midland and located approximately 200 miles west of Milwaukee, acquired the assets and assumed the liabilities of Midland for a purchase price to Midland's stockholders of approximately $13,000,000.00. This transaction was only accomplished through the financial backing and support of First Bank System and was expressly conditioned upon the Comptroller's approval for the establishment of a new branch bank of LaCrosse at Midland's former Milwaukee location. This entire acquisition and resulting branch bank had been secretly negotiated by the Comptroller and First Bank System over a period of many months. The result was that First Bank System, almost twice the size of any other banking system in Wisconsin, obtained its first bank in Milwaukee.

This all occurred because the Comptroller secretly determined an "emergency" existed and that Midland was "failing" which the Comptroller concluded enabled him to ignore clear state and federal statutory regulations restricting branch banking activities. In apparent token recognition of the Wisconsin limitations on branch banks even under emergency situations, the opportunity to merge or consolidate with Midland was only "offered" to petitioner M&I Marshall & Ilsley Bank on Friday, July 22, 1977 with the provision that its decision would have to be made by noon on Sunday, July 24, 1977 and even then, such approval could be denied.

The pleadings expressly allege, however, that there was no emergency situation; that Midland was not failing; that Midland did not have to be merged or consolidated with another bank to protect depositors; and that the opportunity to merge or consolidate with Midland had not been offered to other banks in Milwaukee, all as required by federal and Wisconsin laws.

Petitioners' original complaint challenging both the illegal branch bank and bank holding company violation was dismissed for failure to state a claim and for lack of standing. Leave was given to file an amended complaint on the question of branch bank issue, which amended complaint was also dismissed for lack of standing on June 30, 1980. Petitioners timely appealed to the Court of Appeals for the Seventh Circuit. The Court of Appeals, after oral argument, affirmed the District Court's judgment dismissing the complaints for lack of standing. Petitioners timely sought a rehearing and a suggestion for rehearing in banc by the Court of Appeals, which rehearing was denied in an order issued on August 26, 1981.

Under these circumstances, the illegal nature of LaCrosse Bank's branch is obvious from the pleadings. So too, is the illegal establishment of a branch bank in Wisconsin by a Minnesota bank holding company. The only questions presented are who can challenge an illegal branch bank and do district courts have jurisdiction to review the actions by the Comptroller which enabled a bank holding company to circumvent the limitations of the Bank Holding Company Act.

REASONS FOR GRANTING WRIT

I. USE OF THE "ZONE OF INTERESTS" TEST TO DENY STANDING TO COMPETING BANKS WHICH CHALLENGE AN ILLEGAL BRANCH BANK, ERRONEOUSLY UTILIZES A REQUIREMENT ABANDONED BY THIS COURT AND IS INCONSISTENT WITH NUMEROUS DECISIONS OF OTHER COURTS OF APPEAL AND DISTRICT COURTS.

A. A NATIONAL BANK MAY NOT CREATE A BRANCH BANK UNLESS IT COMPLIES WITH STATE LAW.

In 1977, the banking laws of Wisconsin prohibited the creation of branch banks, except in two narrowly-defined circumstances. §221.04(1)(f) and (j), *Wis. Stats.*[4] [App. E-4-6]. The first exception, contained in §221.04(1)(j)1 (the "bankless community" exception), authorizes the establishment of a branch bank if: (1) The community in which the proposed branch will be located has no bank; (2) no bank is located within three miles of the proposed branch; and (3) the branch bank is within the same county as the home bank or in a contiguous county but within 25 miles of the home bank. The second exception, contained in §221.04(1)(j)2 (the "failing bank" exception), provides that the limitations of the bankless community exception are not applicable if *each* of the following conditions is met: (1) There is an "emergency situation;" (2) a bank is failing; (3) the failing bank must be merged or consolidate with another bank and operated as a branch bank to protect the depositors of the failing bank; (4) findings by the commissioner of banking as to such failure and need for protection; and (5) the opportunity to merge or consolidated has been "offered to and not accepted by all other banks within the geographical limits of" the bankless community exception.

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[4] §221.04(1)(i) provides for the creation of a bank "station" - not branch—"in any town completely surrounded by outlying waters and having no bank." This provision obviously has an extremely limited application, and the present situation is clearly outside its bounds.

These provisions of the Wisconsin Statutes apply to national banks by virtue of 12 U.S.C. §36(c). This federal statute precludes national banks from establishing branch offices except in those circumstances where state law would permit a state bank to establish a branch. The standards of state law relating to branch banking were incorporated into the federal law in order to place national and state banks in a position of "competitive equality" insofar as branch banking is concerned. *First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966). The Comptroller *may* (but is not required to) approve the establishment of a branch bank at any point within the state in which the national bank is situated,

> "....*if* such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, *and subject to the restrictions as to location imposed by the law of the State* on State banks." 12 U.S.C. §36 (c)(2) (Emphasis added).

This provision fully incorporates *all* of the standards of state law including the "when, where and how" such branches may be established. *First National Bank In Plant City v. Dickinson,* 396 U.S. 122, 133 (1969). The Comptroller has no power or authority to authorize national banks to branch except for that contained in 12 U.S.C. §36, which in turn fully adopts and incorporates *all* standards and restrictions of the underlying state branch banking law.

The relief sought by petitioners in their amended complaint (and in count 1 of the first complaint) essentially falls into two categories. First, petitioners seek divestiture by the LaCrosse Bank of its illegally acquired branch office in the former Midland Bank. Since the bankless community exception could not possibly apply, the only exception to the Wisconsin branch banking prohibition that could authorize the establishment of LaCrosse Bank's branch is the failing bank exception. However, paragraphs 25 and 26 of the amended complaint allege there was no emergency; Midland Bank was not failing; and operation as a branch of the LaCrosse Bank was not necessary for the protection of Midland's depositors. [App. D-28-29.]

The second form of relief requested is to direct the Comptroller to comply with the provisions of the failing bank exception of §221.04(1)(j). This requires that the opportunity to merge or consolidate with the failing bank be offered to and not accepted by all other banks within the specified geographical location. Petitioners are obviously within such geographical limits. Again, paragraphs 31 through 33 of petitioners' amended complaint [App. D, *infra*, at D-31-32] allege such opportunity was not offered to any of the petitioners or to any other bank within the geographical limits, with the exception of the sham offer made to petitioner M&I Marshall & Ilsley Bank at 2:00 p.m. Friday, July 22, 1977 to which such bank was required to respond by noon on Sunday, July 24, 1977.

B. THE RIGHT OF A COMPETITOR BANK TO CHALLENGE THE ESTABLISHMENT OF AN ILLEGAL BRANCH UNDER 12 U.S.C. §36 HAS BEEN UPHELD BY EVERY OTHER FEDERAL COURT THAT HAS CONSIDERED THE QUESTION.

There can be no question that competing banks have standing to challenge the establishment of illegal branch banks. This principle has been repeatedly acknowledged by the federal courts, without exception. As the court in *First National Bank of Smithfield v. Saxon*, 352 F.2d 267 (4th Cir. 1965), readily concluded:

> "Nevertheless a competitor has an obvious interest sufficient to warrant his insistence that no branch bank be established through procedures or upon grounds not acceptable under the permissive statutes." 352 F.2d at 272.

Other comparable decisions are *Commercial Security Bank v. Saxon*, 236 F.Supp. 457 (D. D.C. 1964), *aff'd sub. nom. First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252 (1966); *State Bank of Fargo v. Merchants National Bank & Trust Co. of Fargo*, 451 F.Supp. 775 (D. N.D. 1978), *aff'd*, 593 F.2d 341 (8th Cir. 1979); *Bank of Laurel v. Bloom*, 426 F.Supp. 495 (S.D. Miss. 1977); and *Midwest National Bank of Lake Forest v. Comptroller of the Currency of the United States*, 296 F.Supp. 1223 (N.D. Ill. 1968).

In *Midwest National Bank of Lake Forest v. Comptroller of the Currency of the United States*, *supra*, the plaintiff was allowed to challenge the Comptroller's approval under 12 U.S.C. §36(c)(1) of the application of another bank to establish a drive-up facility in Lake Forest, Illinois. The District Court for the Northern District of Illinois stated, "There is no question that the plaintiff, *as a competitor* subject to potential competitive harm from the proposed facility, has standing to pursue this action' " 296 F.Supp. at 1226 (Emphasis added).

Beyond the aforementioned branch banking cases, which have explicitly recognized competitor standing, there are innumerable cases in which such standing under 12 U.S.C. §36 has been implicitly recognized. It would be both superfluous and tedious to enumerate all of these; it suffices to mention only some of the more recent circuit court opinions: *Dakota National Bank & Trust Co. v. First National Bank & Trust Co. of Fargo*, 554 F.2d 345 (8th Cir.), *cert. denied*, 434 U.S. 877 (1977) -- a national bank operating authorized branch on same street as alleged illegal branch allowed to challenge Comptroller's approval of such branch; *First Bank & Trust Co. v. Smith*, 509 F.2d 663 (1st Cir. 1975) — a state bank allowed to challenge establishment of branch bank of national bank in same city; and *Seattle Trust & Savings Bank v. Bank of California, N.A.*, 492 F.2d 48 (9th Cir.), *cert. denied*, 419 U.S. 844 (1974) — seven banks in State of Washington allowed to challenge Comptroller's approval of defendant's application to open a new branch in Seattle.

In addition, this Court has recognized, albeit in a different context, competitor standing to challenge decisions of the Comptroller relating to national banks. In *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), this Court held that the plaintiffs, sellers of data processing services, had standing to challenge the Comptroller's decision that national banks, incident to their banking services, could offer data processing services to other banks and to their customers. Subsequently, this Court relied on this decision in *Investment Company Institute v. Camp*, 401 U.S. 617 (1971), in which the plaintiffs, an association of open-end investment companies and several open-end companies acting individually, sought to challenge the Comptroller's decision that national banks were authorized to establish and operate collective investment funds. The Court stated:

> "... it is urged at the outset that petitioners lack standing to question whether national banks may legally enter a field in competition with them. This contention is foreclosed by Association of Data Processing Service v. Camp, 397 U.S. 150, 90 S. Ct. 827, 25 L. Ed. 2d 184. There we held that companies that offered data processing services to the general business community had standing to seek judicial review of a ruling by the Comptroller that national banks could make data processing services available to other banks and to bank customers. We held that data processing companies were sufficiently injured by the competition that the Comptroller had authorized to create a case or controversy. The injury to the petitioners in the instant case is indistinguishable." 401 U.S. at 621.

Even prior decisions of the Seventh Circuit concerning state banking laws designed to protect competition, allowed competitors to challenge decisions made under that law. *State Bank of Rensselaer v. Heimann*, 619 F.2d 679 (7th Cir. 1980) and *First Union Bank & Trust Co. of Winamac v. Heimann*, 600 F.2d 91 (7th Cir.), *cert. denied*, 444 U.S. 950 (1979). At issue in these cases was a provision in the banking law of Indiana that a branch bank may be established in any city or town within the same county as the home bank only if there is no existing bank located in the same city or town. 600 F.2d at 94 n. 2. The court read this provision as a policy choice by the Indiana legislature that "... it is not prudent to promote competition among banks by means of branches." *Id.* at 99. As such, competitor banks were able to challenge decisions of the Comptroller based upon the state statute. Thus, it is clear that the petitioner banks, as competitors of the LaCrosse Bank's branch, have standing to challenge the Comptroller's illegal approval of the establishment of such branch.

C. CONTRARY TO EVERY OTHER FEDERAL DECISION UPHOLDING STANDING IN BRANCH BANKING DISPUTES BETWEEN COMPETITORS, THE COURT OF APPEALS BELOW ERRONEOUSLY RELIED ON THE DOCTRINE OF "ZONE INTERESTS" IN DENYING STANDING TO PETITIONERS.

The District Court below dismissed the branch banking issues for lack of standing on the grounds petitioners had not alleged "injury in fact".

Labeling the lower court's reasoning in purporting to distinguish the prior settled law as "absurd", the Court of Appeals correctly concluded that the allegations of competitive harm in the amended complaint "are sufficient to satisfy the 'injury in fact' prerequisite to standing", citing *Leuthold v. Camp,* 273 F.Supp. 695 (D. Mont. 1967), *aff'd,* 405 F.2d 499 (9th Cir. 1969).

However, the Court of Appeals having found that the petitioners satisfied this fundamental test, nevertheless went on to consider the so-called "zone of interests" requirement. Ironically, the District Court had earlier concluded that the zone of interests test was "no longer viable" and the absence of its recent application or discussion made it "doubtful that it has any continuing validity." [App. B-8,].

The zone of interests test was initially set forth by this Court in *Data Processing, supra*, and *Barlow v. Collins*, 397 U.S. 159 (1970). "To satisfy this requirement, plaintiffs must show that the relevant statutes were meant to protect them from the type of competition threatened by defendants' actions." In both *Data Processing* and *Barlow*, however, the test was used to *expand*, not restrict, the group of persons who would have standing to contest the legality of certain governmental actions. Not only has this Court neither applied nor discussed this so-called test since 1971, but the requirement itself has been the subject of much criticism. See : Davis, *Administrative Law of the Seventies*, §22.02-11.

The Court of Appeals, however, was "persuaded of the standard's continuing vitality" because of its recent application in *Control Data Corp. v. Baldridge*, 655 F.2d 283 (D.C. Cir. 1981). *Control Data* involved the right of manufacturers and suppliers of computer systems and equipment to challenge rules promulgated by the Secretary of Commerce establishing mandatory specifications governing virtually all procurements of computer equipment by the federal government. The plaintiffs claimed the standards ultimately favored one supplier's specifications and sought to enjoin the enforcement of such rules. After summarizing the legislative history concerning the economic need to standardize government purchases of computer equipment, the court in *Control Data* concluded a bidder for government contracts was not within the zone of interests designed to be protected by the statute in question. In reaching this conclusion, however, even the *Control Data* court acknowledged that other courts "expressed disagreement with" or "clearly misapplied" or "virtually ignored" the zone test. [655 F.2d at 293.]

Control Data is patently so far removed from the issues here as to provide no assistance to the analysis of branch banking statutes. Under the rationale of the decision here, no party would have standing to question the decision of the Comptroller in creating illegal branch banks. Depositors obviously would suffer no injury by virtue of the creation of a branch bank and as such, would have neither the motivation nor the right to challenge such action. If, on the other hand, competing banks who suffer injury in fact are not within the "zone of interests", then the Comptroller would have a free hand to create illegal branch banks simply by his arbitrary declaration of an emergency situation. As such, this decision is the one and only court decision which has either explicitly or implicitly found that competing banks lack standing to litigate branch bank questions.

It is clear that petitioners, as competitors of the La-Crosse Bank's branch, do have standing to challenge the Comptroller's illegal approval of the establishment of such branch. Thus, this Petition should be granted because of the obvious error below in applying the zone of interests test in this case.

II. EVEN IF "ZONE OF INTERESTS" IS A PROPER REQUIREMENT TO DECIDE STANDING IN BRANCH BANKING DISPUTES, THE COURT OF APPEALS BELOW MISAPPLIED WISCONSIN'S "FAILING BANK" BRANCHING EXCEPTION IN THIS CASE BECAUSE THE AMENDED COMPLAINT EXPRESSLY DENIED THAT THE SUBJECT BANK WAS FAILING.

In applying the zone of interests requirement, the Court of Appeals expressly acknowledged that petitioners "do fall within the zone of interests of the ordinary, non-emergency branch banking provisions" of the Wisconsin statutes which generally prohibit branch banking. [App. A-16]. Further, the Court stated: "Competitors of a proposed branch generally are considered to be within the zone of interests of state laws restricting branch banking, which are made applicable to national banks by 12 U.S.C. §36(c)."[5] [App. A, *infra* at p. 17]. What the Court of Appeals failed to realize is that these determinations conclusively establish that petitioners have standing here even if they must meet the zone of interests requirement.

However, the Court of Appeals went on to conclude that petitioners do not have standing under the *exception* to Wisconsin's branch banking laws, which applies in an emergency involving a failing bank. But, this latter determination is both erroneous and totally irrelevant since both the original complaint and amended complaint expressly denied that the Midland bank was failing.[6]

This appeal arose on a motion to dismiss, with the petitioners being denied any discovery. Under the posture of this case, the Court must accept the allegations of the complaints as true.[7] *Walker Processing Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 174-175 (1965); *Levine v. Biddle Sawyer Corp.*, 383 F.Supp. 618 (S.D.N.Y. 1974); and *Collins v. Bolton*, 287 F.Supp. 393 (N.D.Ill. 1968).

Therefore, where a decision is rendered upon the pleadings and the pleadings allege facts showing that

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[5] The decision even acknowledges: "If, as plaintiffs allege, there was no emergency, the Wisconsin branch banking laws and 12 U.S.C. §36 clearly were violated, since only the emergency exception, Wis. Stat. 221.04(1)(j)2, could possibly apply to permit [LaCrosse] Bank's acquisition of Midland." [App. A-13].

[6] In fact, LaCrosse and First Bank System were willing to pay thirteen million dollars to the shareholders of the so-called failing bank to gain entry to the Milwaukee banking market.

[7] The Court of Appeals gave lip service to this basic rule by refusing to consider portions of defendants' brief and appendix which attempted to submit materials purportedly supporting the Comptroller's finding that emergency measures were necessary in order to prevent the failure of Midland. [App. A-2-3].

Wisconsin's failing bank exception does *not* apply, it is clear error for the Court of Appeals to judge the question of standing as if the exception *did* apply. For purposes of this Petition, it must be assumed that Wisconsin's basic prohibition against branch banks is applicable and that the exception permitting branch banks in certain limited situations is not applicable. That being the case, the issue of standing must be judged under the basic prohibition and not under the exception. Since the decision below holds that petitioners do have standing under Wisconsin's basic prohibition, the conclusion that they do not have standing in this case was clearly erroneous and alone is grounds for granting this petition.

III. THE COURT OF APPEALS' INTERPRETATION OF THE OFFER REQUIREMENT OF WISCONSIN'S EMERGENCY BRANCH BANK STATUTE, BOTH IGNORES THE STATUTE'S OBVIOUS PURPOSE AND NULLIFIES ITS EFFECT.

The Wisconsin statute which the Comptroller relied upon in authorizing this otherwise illegal branch bank, required that the petitioners here be given the first opportunity to acquire the bank. This was not done. In order to bar the petitioners from litigating that issue upon the grounds of standing, the Court of Appeals in effect 'interpreted' the requirement right out of the statute. This construction of the controlling state law was directly contrary to the rules established by this Court for application of state law in branch bank disputes.

In *First National Bank of Logan, supra,* this Court clearly stated that national bank branching is allowed only to the extent permitted by state law. This was reiterated in *First National Bank In Plant City, supra,* where the Court stated:

> "The conditions under which national banks may establish branches are embodied in §7 of the McFadden Act, 44 Stat. 1228, as amended, codified in 12 U.S.C.

> §36. One such condition is that a 'branch' may be established only *when*, *where*, and *how* state law would authorize a state bank to establish and operate such a branch, 12 U.S.C. §36(c)." 396 U.S. at 131 (Emphasis added).

This general rule has been repeatedly acknowledged, and both geographical and nongeographical restrictions in state branch banking laws enforced against national banks.[8]

Further, the Comptroller is not free to choose those aspects of state branch bank laws which he will honor in determining whether to authorize a branch of a national bank. This philosophy was summarily rejected in *First National Bank of Logan v. Walker Bank & Trust Co., supra*, where the Comptroller argued that a state law limiting bank branching solely to the taking over of an existing bank which had been in existence for at least five years was inapplicable to national bank branching.

> "It is a strange argument that permits one to pick and choose what portion of the law binds him. Indeed, it would fly in the face of the legislative history not to hold that national branch banking is limited to those States the laws of which permit it, and even there 'only to the extent that the State laws permit branch banking'...."
>
> The Comptroller also contends that the Act supersedes state law only as to 'whether' and 'where' branches may be located and not the 'method' by which this is effected. We believe that where a State

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[8] *See: Hempstead Bank v. Smith*, 540 F.2d 57, 59-60 (2d Cir. 1976) — where the Comptroller was required to make the specific findings dictated by state law; and *Union Savings Bank of Patchogue v. Saxon*, 335 F.2d 718 (D.C. Cir. 1964) — where the Comptroller could not approve a branch bank in an "unincorporated village" when the applicable law of New York only permitted branch offices in "villages".

> allows branching only by taking over an existing bank, it expresses as much 'whether' and 'where' a branch may be located as does a prohibition or a limitation to the home office municipality. As to the restriction being a 'method,' we have concluded that since it is part and parcel of Utah's policy, it was absorbed by the provisions of §§36(c)(1) and (2), regardless of the tag placed upon it." 385 U.S. at 261-62.

In this case, even if Midland was failing, Wisconsin's emergency exception, §221.04(1)(j)2, *Wis. Stat.*, required "that the opportunity to merge or consolidate with [Midland] has been *offered to* and not accepted by *all other banks* within the *geographical limits* of subd. 1." [Emphasis added.] As noted earlier, subdivision 1 of §221.04(1)(j), *Wis. Stat.*, permits a branch in a "bankless" community, provided no bank is within three miles and the home bank of the proposed branch is within the same county or in a contiguous county but within 25 miles.

The offer requirement of Wisconsin's emergency branch bank statute has not been considered by the Wisconsin courts. However, its very simple and logical purpose is to permit local banks, rather than more distant banks, to create a branch bank even in an emergency situation.[9] The petitioners' banks are clearly within the "geographical" limits of the offer requirement, whether such limits be the same county or 25 miles. Nevertheless, no real offer to acquire Midland was made to the petitioners' banks or other banks in Milwaukee County.

The Court of Appeals avoided the offer requirement by interpreting "the phrase 'banks within the geographical limits' to encompass those banks that meet *all* the limitations" of bankless community statute. [App. A, *infra* at p. 20; emphasis added]. From this the

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[9] See 51 Op. Att'y. Gen. 145, 150 (Wis. 1962) for a discussion of the general purposes of Wisconsin's branch banking statute, including the centralized operation of banks and the ease of regulatory supervision, examination and investigation.

Court reasoned that the offer requirement only applied if the failing bank was the only bank in the community and there were no other banks within three miles.

In all due respect to the Court of Appeals, it is difficult to conceive how *all* requirements of the bankless community statute could apply to a failing bank situation. The presence alone of the failing bank eliminates the bankless community exception.

More importantly, the reference to "geographical limits" clearly does not mean *all* the "limits" of the basic bankless restriction. In referring to the requirement for making an offer to "all other banks within the geographical limits", the emergency statute is clearly not referring to the bankless community requirement or the requirement concerning the proximity of other banks. Rather it clearly refers to the separate sentence which limits a branch bank to the same county in which the home bank is located or to 25 miles if contiguous counties are involved.

To misconstrue this statute, as the Court of Appeals did in this case, is obvious error. The decision eliminates the offer requirement from the emergency branch banking laws of Wisconsin.

Most importantly, it selectively "interprets" the state requirements, directly contrary to the explicit direction of this Court in the *Plant City* and *Logan* decisions. This also should be grounds for granting this Petition.

IV. DISTRICT COURTS HAVE JURISDICTION TO CONSIDER THE AUTHORITY OF THE COMPTROLLER TO APPROVE AN ALLEGED ACQUISITION BY A BANK WHICH IN REALITY WAS AN ILLEGAL ACQUISITION BY A BANK HOLDING COMPANY.

The complaint alleged and the answers admitted that the LaCrosse Bank did not have the financial capacity to acquire the Midland Bank without the financial backing of its parent holding company. However, the Minnesota holding company could not legally acquire a Wisconsin bank. Therefore the parties went through the charade of pretending that the LaCrosse Bank was the acquiring entity. Count II of the original complaint in this action sought judicial review of the action of the Comptroller in approving the transaction as an acquisition by the LaCrosse Bank when by any test of substance, the LaCrosse Bank was not in fact the acquiring entity.

The Comptroller has jurisdiction to approve acquisitions by national banks but would not have any authority to approve an acquisition by a holding company. An acquisition by a holding company must be approved by the Federal Reserve Board under the requirements of the Bank Holding Company Act. 12 U.S.C. §1842(a). The complaint challenged the authority of the Comptroller to act under the factual circumstances of this acquisition.

It is settled beyond any possible dispute that an action in the federal district court is the appropriate method for judicial review of any action of the Comptroller which exceeded his legal authority. There are innumerable decisions upholding this procedure under the authority of controlling decisions of this Court. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970); *Investment Company Institute v. Camp*, 401 U.S. 617 (1971); and *Camp v. Pitts*, 411 U.S. 138 (1973).

Notwithstanding this well-settled principle, the Court of Appeals erroneously concluded that the usual district court review of actions of the Comptroller was foreclosed in this case because of the possible peripheral involvement of the Federal Reserve Board. There is no basis for such a concept here. The Federal Reserve Board is not in any way involved in this case. The parties at no time sought the approval of the Federal Reserve Board and the Federal Reserve Board has neither asserted jurisdiction nor taken any action in this case.

The reliance of the Circuit Court upon the decision in *Whitney National Bank v. Bank of New Orleans*, 379 U.S. 411 (1965) is totally misplaced. In that case, the Federal Reserve Board was considering an elaborate bank holding company proposal. One element in the plan involved the chartering of a bank by the Comptroller. Both agencies were thus acting in the matter and the Federal Reserve Board aspect of the case was predominant. Under those circumstances, in order to prevent the pursuit of two separate lines of judicial review, the court determined that the proceeding before the Federal Reserve Board was primary and that the judicial review should be focused at that level.

Here there is no such problem of conflicting jurisdiction or conflicting pending proceedings. Only the Comptroller acted here and the Federal Reserve Board is not in any way involved. The ordinary district court review of the Comptroller's jurisdiction is the simple, prompt and direct method to test the Comptroller's action. No purpose or policy would be served by instead requiring the plaintiffs to become embroiled in litigation with the Federal Reserve Board when that agency had absolutely no part in the disputed action. There is no problem of primary jurisdiction within the concept of the *Whitney* case. By foreclosing the ordinary district court review of the Comptroller's action, the Court of Appeals has in effect foreclosed any judicial review of the transaction in dispute. This arbitrary preclusion of judicial review is contrary to the overwhelming policy favoring such review. *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

CONCLUSION

This case involves an extraordinary distortion of established concepts of standing so as to foreclose the essential right to judicial review of clearly improper administrative disregard of explicit statutory requirements. In a single case, we see:

(1) the application of the virtually ignored and often criticized "zone of interests" test to singularly deny standing to competing banks in a branch banking dispute;

(2) the application of a test of standing to the plaintiffs at the pleading stage of the action in total disregard of the factual allegations of the complaint which established standing;

(3) a denial of standing based upon the emasculation of a state branch banking restriction, contrary to explicit federal law as interpreted by this Court; and

(4) a denial of any effective opportunity for review of the subterfuge employed by the Comptroller in purporting to approve a transaction which was beyond his jurisdiction.

Taken together, these rulings by the Court of Appeals have perverted the concept of standing into an absolute bar to seek judicial review by the parties most directly affected by the improper administrative action. The basic right to judicial review will be lost unless this Court reviews and reverses the restrictive concepts of standing applied by the Court of Appeals.

Respectfully submitted,

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APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

In the

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 80-2251
MARSHALL & ILSLEY CORPORATION, et al.,
Plaintiffs-Appellants,

v.

JOHN G. HEIMANN, Comptroller of the Currency of the United States, et al.
Defendants-Appellees.

Appeal from the United States District Court for the
Western District of Wisconsin
No. 78 C 42 Hubert L. Will, *Judge*

Argued April 9, 1981 — Decided June 12, 1981

Before SWYGERT and SPRECHER, *Circuit Judges,* and HOFFMAN, *Senior District Judge.*[*]

SPRECHER, *Circuit Judge.* This case arises out of the purchase of assets and assumption of liabilities of the Midland National Bank ("Midland") in Milwaukee,

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[*] Honorable Walter E. Hoffman, Senior District Judge for the Eastern District of Virginia is sitting by designation.

Wisconsin by defendant First Bank (N.A.) of LaCrosse, Wisconsin ("First Bank") and the establishment by First Bank of a new branch bank at the office formerly operated by Midland. These transactions were approved by the Comptroller of the Currency of the United States. Plaintiffs, three Milwaukee banks and the bank holding companies that own them, filed this action against the Comptroller, First Bank, and First Bank System, Inc., the holding company that owns First Bank. Plaintiffs allege that the Comptroller violated 12 U.S.C. §36(c) and Wis. Stat. §221.04(1)(j) by permitting First Bank to retain the former Midland office as a branch bank. Plaintiffs also allege that the acquisition of Midland by First Bank was, in reality, an acquisition by First Bank System, and thus, was a holding company acquisition over which the Comptroller had no jurisdiction and which the Comptroller had no authority to approve.

The district court dismissed plaintiffs' original complaint for lack of standing and failure to state a claim. The district court similarly dismissed plaintiffs' amended complaint for lack of standing. We affirm the dismissal of plaintiffs' complaints.

I

The parties disagree as to the facts properly before this court upon review of the district court's orders dismissing plaintiffs' complaints. Plaintiffs have moved to strike portions of First Bank's brief and appendix on the ground that they incorporate contested factual matters that properly were excluded by the district court in resolving the threshold issues of standing and jurisdiction. In particular, plaintiffs object to defendants' submission of materials supporting the Comptroller's finding that emergency measures were necessary in order to prevent the failure of Midland. We agree that only the record established in the district court, and not additional materials submitted by the Comptroller to this court on appeal, are properly before this court. We, therefore, draw no conclusions from the additional materials submitted and confine our review to the following uncontested facts.

By decision dated July 23, 1977, the Comptroller approved the application of First Bank[1] to purchase the assets and assume the liabilities of Midland.[2] At that time, Midland was the fourth largest bank in Wisconsin. First Bank was considerably smaller, but was and is owned by First Bank System, Inc., of Minneapolis, Minnesota, a bank holding company that controls many banks, with total deposits exceeding $6 billion. The Comptroller's decision was based upon his finding that, from the fall of 1975 through the spring of 1977, Midland suffered a severe and continuing deterioration in its asset structure, principally due to real estate loan problems. The Comptroller reasoned that the severity of the loan problems, as well as the volatility of the bank's deposit structure, threatened Midland's survival unless Midland received a massive injection of capital.

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[1] At the time of this transaction, First Bank was named "National Bank of Wisconsin in LaCrosse." After the Midland transaction, the name was changed to "First Bank (N.A.)."

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[2] According to the affidavit of Robert Bloom, First Deputy Comptroller of the Currency, the Comptroller's staff was advised of a tentative understanding between First Bank and Midland on July 20, 1977. On July 22, 1977, members of the Comptroller's staff met with representatives of plaintiff Marshall & Ilsley Bank. Marshall & Ilsley was given until Sunday, July 24, to advise the Comptroller if it had any interest in acquiring Midland. Marshall & Ilsley alleges that the time permitted to consider the acquisition was so unreasonable as to render it a sham offer. The record before us does not allow us to decide the likelihood that Marshall & Ilsley would or could have acquired Midland.

Meanwhile, on July 23, 1977, Midland and First Bank signed the purchase and assumption agreement. First Bank was to receive all real and personal property and all intangible assets of Midland in exchange for assuming the deposit and other business liabilities of Midland plus paying approximately $13 million in cash. The agreement was contingent on receiving the Comptroller's approval, which was granted on July 23.

The Comptroller considered First Bank's offer to purchase Midland a good solution that would avoid a bank failure and would insure uninterrupted services to Midland's customers.

Because the Comptroller regarded Midland's situation as an emergency, the Comptroller, pursuant to 12 U.S.C. §181,[3] waived the requirement of shareholder approval and waived certain other requirements of bank mergers, pursuant to the Bank Merger Act, 12 U.S.C. §1828(c).[4] The Comptroller also determined that the retention of Midland's existing office as a branch of First Bank was consistent with Wisconsin's emergency branch banking statute, Wis. Stat. §221.04(1)(j)2, which

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[3] 12 U.S.C. §181 provides in pertinent part:

> Any association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock. If the liquidation is to be effected in whole or in part through the sale of any of its assets to and the assumption of the deposit liabilities by another bank, the purchase and sale agreement must also be approved by its shareholders owning two-thirds of its stock *unless an emergency exists and the Comptroller of the Currency specifically waives such requirement for shareholder approval.*

(emphasis added)

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[4] The Bank Merger Act, 12 U.S.C. §1828(c), which deals with determination of the antitrust aspects of bank mergers, requires the Comptroller to follow certain procedures, including notice to and solicitation of reports from other agencies and the Attorney General, before allowing a national bank to acquire the assets and assume the liabilities of another national bank. The Bank Merger Act allows waiver of these requirements if the Comptroller "finds that it must act immediately in order to prevent the probable failure of one of the banks involved...." 12 U.S.C. §1828(c)(3), (4), (6). In particular, 12 U.S.C. §1828(c)(6) provides that in an emergency, the transaction may be consummated immediately upon approval by the Comptroller.

is made applicable to national banks by 12 U.S.C. §36(c).[5]

In January, 1978, plaintiffs filed this action. The original complaint alleged that the Comptroller's approval of the establishment of a branch of First Bank in Milwaukee violated the applicable statutes which limit the establishment of branches by national banks. The original complaint also alleged that the Comptroller had exceeded his juridiction and had violated the Bank Holding Company Act, 12 U.S.C §1842, in purporting to approve an acquisition by First Bank which was actually an acquisition by First Bank System, Inc., a bank holding company located outside Wisconsin.

The initial decision of the district court, dated September 16, 1978, dismissed the branch banking claim in plaintiffs' complaint without prejudice. The court held that plaintiffs lacked standing with regard to the branch bank issue because they failed to allege "injury in fact." The district court dismissed the Bank Holding Company Act claim with prejudice, holding that no private right of action against the Comptroller could be derived from the Bank Holding Company Act.

Plaintiffs filed an amended complaint limited to the branch banking issue. By order dated June 30, 1980, the district court dismissed the amended complaint for lack of standing.

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[5] The authority of the Comptroller to approve branches of national banks is found in 12 U.S.C. §36, which incorporates state limitations on branch banking. 12 U.S.C. §36(c) provides in pertinent part:

> (c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches:. . . (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks....

II

We deal first with plaintiffs' standing to assert the branch banking issues raised in plaintiffs' amended complaint.[6] Plaintiffs' amended complaint sets forth two alternative theories of how the Comptroller violated federal and state branch banking statutes: Count I alleges that allowing First Bank to acquire the former Midland facility as a branch violated 12 U.S.C. §36 and the Wisconsin emergency branch banking statute, Wis. Stat. §221.04(1)(j)2, because there was no "emergency" at the time the Comptroller acted; Count II alleges that. even if there was an emergency, the Comptroller violated Wis. Stat. §221.04(1)(j)2 by failing to first offer plaintiffs the opportunity to acquire Midland.

As Justice Douglas stated in *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 151 (1970), "[g]eneralizations about standing to sue are largely worthless as such." One commentator has noted that the concept of standing is "among the most amorphous in the entire domain of public law." Hearings on S.2097 before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 89th Cong., 2d Sess. 465, 498 (1966) (statement of Prof. Paul A. Freund), *quoted in Flast v. Cohen*, 392 U.S. 83, 99 (1968). In order to avoid confusion and inconsistency in analyzing standing questions, it is necessary to focus on the precise parties, injuries, interests, and statutes involved. Therefore, we must narrow our focus to the specific issue of standing of competitors to challenge agency action which results in allegedly illegal competition.

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[6] The two branch banking claims in plaintiffs' amended complaint were contained in Count I of plaintiffs' original complaint. Count I of the original complaint was dismissed for lack of standing because plaintiffs failed to adequately allege injury in fact flowing from First Bank's acquisition of Midland, the operation of the former Midland facility as a branch bank, and the failure to provide plaintiffs with an opportunity to acquire Midland's operations. *See United States v. SCRAP*, 412 U.S. 669 (1973); *Sierra Club v. Morton*, 405 U.S. 727 (1972).

Plaintiffs subsequently amended their complaint to include allegations of: (1) competitive injury from the allegedly illegal First Bank branch and (2) injury from the failure to offer Midland to plaintiffs, since one or more of them might have acquired Midland if they had been given a fair opportunity to do so. The district court found, however, that competitor status, in the absence of "injury in fact," was insufficient to confer standing to challenge the Comptroller's decision. The district court also found that the offer requirement of Wis. Stat. §221.04(1)(j)2 was not binding on the Comptroller, so plaintiffs had no cognizable claim against the Comptroller under that statute.

The general test for standing was first articulated by the Supreme Court in three cases involving competitors' challenges to Comptroller rulings allowing national banks to enter the competitors' fields. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970) (data processing); *Arnold Tours v. Camp*, 400 U.S. 45 (1970) (travel services); *Investment Company Institute v. Camp*, 401 U.S. 617 (1971) (mutual investment funds). The test enunciated in these cases gives meaning to the Administrative Procedure Act's grant of standing to persons "aggrieved by agency action within the meaning of a relevant statute...." 5 U.S.C. §702.

The test has two prongs. The first part of the test requires that "the plaintiff alleges that the challenged actions has caused him injury in fact, economic or otherwise." *Data Processing*, 397 U.S. at 152. The second part of the test requires that "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." 397 U.S. at 153.

A

We now consider the first requirement of standing, that there be an "injury in fact." This requirement assures satisfaction of the constitutional requirement of a "case or controversy." *See Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 37-38 (1976). Plaintiffs original complaint was dismissed because it did not include any allegations of injury in fact, economic or otherwise. The court refused to construe the complaint as alleging the adverse effect necessary to give plaintiffs standing and, consequently, dismissed with leave to amend.[7]

In their amended complaint, plaintiffs allege that plaintiff banks and Midland were within a radius of one-half mile of each other and competed actively. Plaintiffs allege damages resulting from "illegally acquired changes in the competitive environment" caused by First Bank's acquisition of Midland.[8] The

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[7] While the district court doubted that plaintiffs could show that they were injured by the Comptroller's failure to offer them the opportunity to buy Midland, the court indicated that plaintiffs might be able to establish some type of competitive injury:

> [I]t is possible that plaintiffs could establish that they have suffered or expect to suffer an economic injury by the Comptroller's intervention into the Milwaukee banking field by alleging facts tending to show that as a consequence of his action, there was an improvement in Midland's ability to compete with the plaintiff banks and tending to show that the defendant holding company gained a competitive advantage over the plaintiff holding companies.

Marshall & Ilsley v. Heimann, No. 78-C-42, slip op. at 12 (W.D.Wis. Sept. 18, 1978).

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[8] Plaintiffs claim that they were injured in the following respects:

> (a) First Bank System and First Bank were permitted to establish a branch bank office in the immediate proximity of plaintiffs and thereby to compete with plaintiffs through a Milwaukee office in direct violation of the laws regulating branch bank locations; (b) First Bank System and First Bank were permitted to expand their commercial banking operations into the Milwaukee market and business area which is substantially removed from their prior areas of operation, while similar expansion opportunities are denied to plaintiffs; and (c) the Comptroller's action created a double standard under which special rights and privileges have been granted to First Bank and First Bank System which are contrary to law, thereby enabling First Bank

district court held that, although plaintiffs alleged that they and the new First Bank branch at the former Midland location were competitors, "plaintiffs' amended complaint still contains no allegation of any concrete or identifiable injury, whether economic or otherwise, caused them by the defendants' acts unless competition itself is somehow considered injurious." *Marshall & Ilsley Corp. v. Heimann*, No. 78-C-42, slip op. at 4 (W.D.Wis. June 30, 1980).

The Supreme Court has held, however, that an administrative agency's authorization of an allegedly illegal competitor or form of competition *does* constitute injury to competitors for standing purposes. In *Data Processing*, 397 U.S. 150 (1970), *Arnold Tours*, 400 U.S. 45 (1970), and *Investment Company Institute*, 401 U.S. 617 (1971), the Comptroller gave national banks permission to enter new areas of operation. "Injury in fact" flowed from the economic harm caused by an additional competitor. In *Sierra Club v. Morton*, 405 U.S. 727 (1972), the Court reaffirmed the *Data Processing* holding that harm to competitive position comprises "injury in fact":

> In *Data Processing*, the injury claimed by the petitioners consisted of harm to their competitive position in the computer-servicing market through a ruling by the Comptroller of the Currency that national banks might perform data-processing services for their customers... These palpable economic injuries have long been recognized as sufficient to lay the basis for standing, with or without a specific

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[8] (continued)

> System to create illegally a multi-state affiliation of banking institutions with total assets substantially exceeding the combined assets of all plaintiffs.

Amended Complaint ¶27. Plaintiffs' amended complaint also claims competitive injury can be inferred from advertisments stating that the former Midland facility, because it is now part of First Bank System, would be able to "introduce a level of competition unprecedented in the history of Wisconsin banking." Amended Complaint ¶28.

statutory provision for judicial review.

405 U.S. at 733-34 (footnote omitted).

Defendants argue that *Data Processing* and other cases challenging decisions by the Comptroller are distinguishable because, in those cases, competitive injury was readily inferred as a result of the Comptroller's authorization of *new* branches or *new* forms of competition.[9] Here, plaintiffs challenge the change of ownership of an existing bank. According to the district court, where there is "replacement" rather than "new" competition, competitive injury cannot be "assumed from the situation itself or inferred from plaintiffs' allegations." *Marshall & Ilsley Corp. v. Heimann*, No. 78-C-42, slip op. at 11 (W.D.Wis. Sept. 18, 1978). But, while the establishment of a new branch bank where there was no bank is certainly a more obvious form of competitive harm than the transformation of an existing bank into a branch bank, we do not find the differences between "new" and "replacement" competition decisive.

According to the cases involving "new" competition, if First Bank had attempted to establish a new branch in Milwaukee, plaintiffs would have standing to challenge the legality of that new branch; competitive injury would be assumed to flow from a new source of competition.[10] In this case, there can be no doubt that conversion of Wisconsin's fourth largest bank into a

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[9] *See, e.g., State Bank of Fargo v. Merchants Nat'l Bank & Trust Co. of Fargo*, 451 F.Supp. 775, 784 (D.N.D. 1978), *aff'd*, 593 F.2d 341 (8th Cir. 1979) (establishment of two new customer electronic funds transfer centers); *Marion Nat'l Bank of Marion v. Van Buren Bank*, 418 F.2d 121, 123 (7th Cir. 1969) (opening of new banking facility).

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[10] Many opinions involving competitors' challenges to the establishment of allegedly illegal branches do not even discuss the standing issue. Recognition of competitive injury is implicit. *See State Bank of Renesselaer v. Heimann*, 619 F.2d 679 (7th Cir. 1980); *First Union Bank & Tr. Co. of Winamac v. Heimann*, 600 F.2d 91 (7th Cir.), *cert. denied*, 444 U.S. 950 (1979).

branch of a bank located in a different city and owned by an enormous bank holding company represents a change in the competitive configuration of Milwaukee's banking community. To hold that plaintiffs would satisfy the "injury in fact" requirement for purposes of challenging a totally new branch, no matter how small, but that plaintiffs must allege more specific and identifiable harm when the allegedly illegal branch is an acquired bank, would be absurd. We find that the allegations of competitive harm in plaintiffs' amended complaint are sufficient to satisfy the "injury in fact" prerequisite to standing. *Cf. Leuthold v. Camp*, 273 F.Supp, 695 (D.Mont. 1967), *aff'd*, 405 F.2d 499 (9th Cir. 1969) (competitor challenge allowed although Comptroller's action did not increase the number of competitive banking facilities).

B

A showing of an injury in fact is a necessary, but not a sufficient prerequisite for standing. Plaintiffs also must satisfy the second prong of the standing test, the "zone of interests" requirement. To satisfy this requirement, plaintiffs must show that the relevant statutes were meant to protect them from the type of competition threatened by defendants' actions. The "zone of interests" requirement is a prudential limitation, which has not been extensively developed by the Supreme Court since *Data Processing*. For this reason, the district court, in dismissing plaintiffs' original complaint, held that the requirements for standing are satisfied by a showing of an injury in fact, economic or otherwise, and that plaintiffs need not establish that they come within any "zone of interests."[11] We disagree.

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[11] The district court went on to hold that plaintiffs had failed to allege an "injury in fact." Thus, even if the district court had acknowledged that the zone of interests test is still viable, it did not have to reach that issue. *See Sierra Club v. Morton*, 405 U.S. at 733 n.5.

This circuit consistently has required satisfaction of the zone of interests test for standing. *Bradford School Bus Transit, Inc. v. Chicago Transit Authority*, 537 F.2d 943, 946 (7th Cir. 1976), *cert. denied*, 429 U.S. 1066 (1977); *Apter v. Richardson*, 510 F.2d 351, 353 (7th Cir. 1975). Although the Supreme Court has not elaborated on the zone of interests standard recently, the standard is still referred to by the Supreme Court as an element of the test for standing.[12] We further are persuaded of the standard's continuing vitality by the thoughtful and detailed discussion in *Control Data Corp. v. Baldridge*, No. 80-1143, slip op. at 13-17 (D.C.Cir. March 25, 1981). *See also Tax Analysts & Advocates v. Blumenthal*, 566 F.2d 130, 138-43 (D.C.Cir. 1977), *cert. denied*, 434 U.S.1086 (1978). Therefore, although we find, contrary to the district court, that plaintiffs have alleged a personal stake and interest in the litigation which amounts to an "injury in fact," the standing issue is by no means decided. We must also decide whether the particular interest asserted by plaintiffs is arguably protected by the particular statutory provision involved. *See Tax Analysts*, 566 F2d at 140.

We apply the zone of interests analysis separately to each count and each statute involved.

1

In Count I of their amended complaint, plaintiffs claim that there was no "emergency" at Midland — that Midland was not in danger of failing. In order to satisfy the zone of interests test for Count I, plaintiffs' interests must be protected by the relevant emergency provisions. Only if plaintiffs have standing to dispute the emergency determination, do the particular banking claims in Count I become an issue.[13] Both state and federal statutory provisions concerning emergency measures that are permitted when a bank is near failure are involved here. While plaintiffs base their standing arguments on the state branch banking law, the federal emergency provisions invoked by the Comptroller also are relevant in determining the interest protected by the emergency branching statute.

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[12] *See* cases cited in *Control Data Corp. v. Baldridge*, No. 80-1143, slip op. at 16 n.12 (D.C.Cir. March 25, 1981).

a

First we deal with the federal emergency statutes. The Comptroller may waive shareholder approval of the sale of assets and assumption of liabilities of a failing bank and may allow immediate consummation of the transaction pursuant to 12 U.S.C. §§181 and 1828(c).[14] Under each of these statutes, we find that plaintiffs' interests in preventing illegal competition are not within the zone of interests intended to be protected by the statutes.

The interests protected by 12 U.S.C. §181 are clearly those of the shareholders of a bank being liquidated and, in situations where a bank is failing, those of shareholders and bank customers.[15] The reason for allowing waiver of shareholder approval is to prevent "delays in rendering financial assistance to national banks in emergency situations." Hearings on H.R. 6092 and H.R. 6093 before Subcommittee No. 2 of the House

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[13] Wisconsin branch banking law prohibits establishment of branch banks except as provided by Wis. Stat. §§221.04(1)(i), (j), and (l). Wis. Stat. §221.04(1)(f). If, as plaintiffs allege, there was no emergency, the Wisconsin branch banking laws and 12 U.S.C. §36 clearly were violated, since only the emergency exception, Wis. Stat. §221.04(1)(j)2, could possibly apply to permit First Bank's acquisition of Midland.

[14] *See* notes 3, 4, *supra*.

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[15] It is unnecessary to go beyond the words of the statute to see that bank shareholders are the primary beneficiaries of the statute. Moreover, the legislative history reinforces that observation:

Committee on Banking and Currency, 86th Cong., 1st Sess. 39 (1959).

From this brief analysis of the statute, it is clear that competitors of an allegedly failing bank, unlike shareholders, are not among those whose interests are protected by 12 U.S.C. §181. Plaintiffs, therefore, do not have standing to challenge the Comptroller's determination of an emergency based on that provision.

The other federal statutory provision involving the Comptroller's determination of an emergency is 12 U.S.C. §1828(c). This portion of the Bank Merger Act concerns the antitrust implications of bank mergers. It establishes procedures "for the review of proposed bank mergers so as to eliminate the necessity for the dissolution of merged banks." H. Rep. No. 1221, 89th Cong., 2d Sess. 1, *reprinted in* 1966 *U.S. Code Cong. & Ad. News 1860. These procedures may be expedited when the responsible agency finds "that it must act immediately in order to prevent the probable failure of one of the banks involved." 12 U.S.C.* §1828(c)(3), (4), (6).

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[15] (continued)

> Section 15 would amend Revised Statutes, section 5220 (12 U.S.C. 181), relating to the liquidation of national banks, by adding a requirement that shareholders must approve a purchase and sale agreement if any part of the liquidation is to be accomplished by the sale of any of the bank's assets, but excusing the need for such a vote if in an emergency the Comptroller specifically waives it. Existing law does not require shareholder approval of any agreement the directors make for a bulk sale of bank assets to another bank as a preliminary step to voting the selling bank into voluntary liquidation. This new provision would provide for a shareholder vote in such cases, except in emergencies....

S.Rep. No. 730, 86th Cong., 1st Sess. 4-5, *reprinted in* 1959, *U.S. Code Cong. & Ad. News* 2232 at 2236. *See also Minichello v. Saxon,* 337 F.2d 75, 82 (3d Cir. 1964), *cert. denied,* 380 U.S. 952 (1965) and, *on remand,* 266 F.Supp. 279 (M.D.Pa. 1967), *aff'd* 394 F.2d 715 (3rd Cir.), *cert. denied,* 393 U.S. 849 (1968) ("The 1959 statute resulted from a belief on the part of Congress that shareholders to that time had not had effective control over the execution of bulk sale agreements made in contemplation of liquidation").

Under the Bank Merger Act, the Comptroller's determination of an emergency eliminates procedures for pre-merger examination of the antitrust implications of bank mergers. In order to fall within the zone of interests of 12 U.S.C. §1828(c), plaintiffs must represent the particular competitive interest addressed by the statute — the interest in preventing antitrust violations. Here, there is no allegation that First Bank's purchase of Midland violates any antitrust laws. Plaintiffs' "interest" is in avoiding competition from an illegal branch. This interest is very different from an interest in avoiding monopolization of the Milwaukee banking community.

In *Control Data Corp. v. Baldridge*, No. 80-1143, slip op. at 24-27 (D.C.Cir. March 25, 1981), the court held that plaintiffs are not within the zone of interests of a statute where their competitive interest does not match the particular interest in competition protected by that statute. Here, plaintiffs' general interest in competition does not match the antitrust interest of the statute. Therefore, we find that plaintiffs do not have standing to challenge the Comptroller's determination of an emergency under 12 U.S.C. §1828(c).

b

Finally, we reach the question of whether plaintiffs' challenge to the Comptroller's determination of an emergency is within the zone of interests protected by the Wisconsin emergency branch banking statute, Wis. Stat. §221.04(1)(j)2. Wisconsin branch banking law is relevant to the Midland transaction because, according to federal banking laws, the Comptroller may not approve a branch of a naional bank unless state law prerequisites to branching are satisfied. 12 U.S.C. §36(c).

In Wisconsin, branch banking is forbidden, except as provided by statute. Ws. Stat. §221.04(1)(f). One statutory provision allows branch banking in a "bankless community." Wis. Stat. §221.04(1)(j)1. This statute allows a bank to establish a branch in a municipality that has no bank or branch bank only if there is no bank or branch bank within three miles of the proposed branch and if the home bank is in the same county as the branch, or is in a contiguous county and within 25 miles of the branch.[16] Wis. Stat. §221.04(1)(j)2 provides an exception to §221.04(1)(j)1 in emergencies.

> 2. The limits set forth in subd. 1 may not apply to any emergency situation where the commissioner finds that a bank is failing and that it must be merged or consolidated with another bank and operated as a branch bank for the protection of the depositors of the failing bank and that the opportunity to merge or consolidate with the bank has been offered to and not accepted by all other banks within the geographical limits of subd. 1.

It is important to distinguish the zone of interests protected by the emergency branch banking statute, §221.04(1)(j)2, from the zone of interests protected by the ordinary branch banking restrictions §221.04(1)(f), (i), (j)1, and (l). Although plaintiffs do fall within the zone of interests of the ordinary, non-emergency branch banking provisions, we find that plaintiffs do *not* fall within the zone of interests protected by the Wisconsin emergency branch banking statute.

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[16] Wis. Stat. §221.04(1)(j)1 provides that a bank has the power:

> To establish and maintain a branch bank, upon approval by the commissioner and the banking review board, in a municipality other than that in which the home bank is located, if such municipality has no bank or branch bank at the time of application and if no bank or branch bank is located within a radius of 3 miles from the proposed site of the branch; however, such 3-mile limitation shall be computed by measuring the street or road mileage of that route which the commissioner and board find would be ordinarily and customarily traveled as the shortest distance between such bank or branch bank and the proposed site of the branch. A branch bank established under this paragraph shall be located in the same county in which the home bank is located or in a contiguous county if the location of such branch bank is no more than 25 miles from the bank....

Competitors of a proposed branch generally are considered to be within the zone of interests of state laws restricting branch banking, which are made applicable to national banks by 12 U.S.C. §36(c). The purpose of 12 U.S.C. §36(c) is to place national and state banks on a basis of "competitive equality" with respect to branch banking. *First Nat'l Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966). Thus, both state and national banks that would compete with a proposed branch of a national bank are protected by 12 U.S.C. §36(c) from illegally authorized competition.[17] In fact, in many cases where the Comptroller's approval of an allegedly illegal branch is challenged by a competitor, standing is simply assumed. *See, e.g., State Bank of Rensselaer v. Heimann*, 619 F.2d 679 (7th Cir. 1980); *First Union Bank & Trust Co. of Winamac v. Heimann*, 600 F.2d 91 (7th Cir.)., *cert. denied*, 444 U.S. 950 (1979); *First Nat'l Bank of Crown Point v. Camp*, 463 F.2d 595 (7th Cir. 1972); *Marion Nat'l Bank v. Van Buren Bank*, 418 F.2d 121, 123 (7th Cir. 1969).[18]

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[17] Indeed, competing banks are more clearly within the zone of interests of the relevant statutes regulating branch banking than the non-bank competitors that challenged allegedly unlawful competition from national banks in *Data Processing*, *Arnold Tours*, and *Investment Co. Institute*. Yet all of these interests were found to be within the zone of interests protected by the relevant banking laws.

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[18] In *Marion Nat'l Bank*, the court briefly mentioned the standing question:

> Plaintiffs brought this action. The Van Buren Bank stipulated to their standing. The comptroller did not, but has not seriously contested it on appeal.

418 F.2d at 123. Other circuits and district courts which have explicitly considered the issue have found standing for competitors. *See, e.g., National State Bank of Elizabeth v. Smith*, 591 F.2d 223, 228 (3d Cir. 1979); *First Nat'l Bank of Smithfield v. Saxon*, 352 F.2d 267, 272 (4th Cir. 1965), aff'd, 385 U.S. 252 (1966); *Mid-West Nat'l Bank of Lake Forest v. Comptroller*, 296 F.Supp. 1223, 1226 (N.D.Ill. 1968).

The Wisconsin emergency statute, however, provides on its face that the decision that a bank is failing and must be operated as a branch of another bank is made "for the protection of *depositors*" (emphasis added). This language seems to indicate that competing banks are not within the zone of interests protected by the emergency branch banking statute. Attempting to avoid the clear statutory pronouncement, plaintiffs argue that, although the emergency procedures are meant to protect depositors of a failing bank, the threshold decision that the bank is failing may be challenged by competitors if that decision results in establishment of a branch bank that would be illegal in the absence of a failing bank emergency. The problem with plaintiffs' argument is that the emergency provision in carving out an exception to the Wisconsin branch banking provisions, also carves out competitors' standing to challenge the application of the exception.

There are no Wisconsin cases discussing the zone of interests protected by the emergency branch provision,[19] but the provision is comparable to the emergency provisions in federal banking laws discussed earlier, 12 U.S.C. §§181 and 1828(c). The purpose of both the Wisconsin and federal emergency banking provisions is to restructure the assets and liabilities of a failing bank with a minimum of disruption of services to depositors. If other banks were allowed to challenge the Comptroller's determination of an emergency solely on the basis of their status as competitors, the objectives justifying these emergency procedures could be thwarted by the purely selfish desires of competitors to keep a new competitor out of the local banking community.

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[19] In *First Nat'l Bank of Wisconsin Rapids v. M&I Peoples Bank of Coloma*, 95 Wis.2d 303, 290 N.W.2d 321 (1980), the Wisconsin Supreme Court discussed the zone of interests of the "bankless community" exception to the prohibition against branch banking, §221.04(1)(j)1. In *Coloma*, a competing bank challenged the approval of an application to establish a branch bank. Plaintiff claimed that the branch bank would be more than 25 miles from the home bank, in violation of §221.04(1)(j)1. The court held that plaintiff had alleged sufficient injury, but held, without any discussion of the statutory scheme or legislative history, that "the requirement of sec. 221.04(1)(j)1, Stats., that a branch be no more than 25 miles from the home bank (if in a contiguous county), does not evince an intent to protect competitors." 290 N.W.2d at 327. The significance of the court's conclusion is questionable, since the court proceeded with an extensive analysis of plaintiff's standing pursuant to Wisconsin's quo warranto statute, Wis. Stat. §294.04(2). The court held that the quo warranto statute explicitly granted competitor standing. Therefore, plaintiff had standing to bring the quo warranto action even in the absence of a statutory purpose to protect against competitive injury. In a footnote, the court acknowledged that its conclusion

In addition, to evincing an intent to protect depositors of a failing bank, §221.04(1)(j)2 provides that when an emergency requires lifting the general prohibitions against branch banking, banks within the geographical limits of §221.04(1)(j)1 must be offered the opportunity to merge or consolidate with the failing bank. Consequently, we must examine §221.04(1)(j)1 to determine: (1) the meaning of the "geographical limits" referred to in §221.04(1)(j)2 and (2) whether plaintiffs fit within those geographical limits.

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[19] (continued)

regarding standing to protect a competitive interest was contrary to many federal decisions, but declined to clarify the issue because standing clearly was proper under the quo warranto statute. 290 N.W.2d at 327 n.6.

Plaintiffs argue that the Administrative Procedure Act ("APA") authorizes plaintiffs' standing here just as the quo warranto statute did in *Coloma*. But the APA does not by itself confer standing. 5 U.S.C. §702 confers standing on persons "adversely affected or aggrieved by agency action *within the meaning of a relevant statute*" (emphasis added). Thus, plaintiffs must be within the zone of interests protected by a "relevant statute" other than the APA.

We find that the *Coloma* decision does not resolve the question of the zone of interests of the emergency branch banking statute. The bare statement in *Coloma* that the 25 mile limit does not evince an intent to protect competitors does not aid interpretation of other parts of the Wisconsin branch banking statutes. Therefore, we do not rely on *Coloma* in our discussion of the zone of interests protected by Wisconsin's emergency branch banking statute, §221.04(1)(j)2.

What is meant by the geographical limits of §221.04(1)(j)1 is not entirely clear from the face of §221.04(1)(j)1. But we interpret[20] the phrase "banks within the geographical limits" to encompass those banks that meet all the limitations of §221.04(1)(j)1 and, therefore, could have acquired the failing bank as a branch, pursuant to §221.04(1)(j)1, even without an emergency. This interpretation thus entails geographical limitations on the failing bank, as well as on the acquiring bank. In other words, for the "offer" requirement to apply, the failing bank must be the only bank or branch bank in its municipality; there must be no bank or branch bank within three miles of the failing bank; and the acquiring bank must be either in the same county or in a contiguous county and within 25 miles of the failing bank. Only the banks within those geographical limits are entitled to an offer pursuant to §221.04(1)(j)2.

The "offer" provision is an attempt to minimize the exceptions to the general rule on branching. The "offer" provision evinces an intent to have, whenever possible, even in an emergency, a branch bank/home bank relation that would be otherwise allowable under §221.04(1)(j)1. We find that only a bank which meets the geographical requirements and which, therefore, could have operated the failing bank as a branch bank, comes within the zone of interests protected by the emergency branch banking statute's "offer" provision. Thus, only a bank which is entitled to an offer under the statute has standing to challenge the determination of an emergency.

The former Midland facility and plaintiffs' banks are all in Milwaukee and are within a one mile radius of each other. Thus, none of the plaintiffs could have qualified under §221.04(1)(j)1 to acquire Midland as a branch. Since plaintiffs are not within the geographical limits of §221.04(1)(j)1, they do not have standing to challenge the Comptroller's determination that Midland's condition warranted waiver of the usual geographical restrictions on branch banking. Consequently, even though plaintiffs are within the zone of interests of the ordinary branch banking statute, they are not within the zone of interests protected by Wisconsin's emergency branch banking statute.

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[20] Although "the federal statute has incorporated by reference the limitations which state law places on branch banking activities by state banks," *First National Bank in Plant City v. Dickinson*, 396 U.S. 122, 131 (1969), the interpretation of those incorporated statutes is a matter of federal law. *First National Bank of Fairbanks v. Camp*, 465 F.2d 586 (D.C.Cir. 1972), *cert. denied*, 409 U.S. 1124 (1973).

Plaintiffs' argue, however, that they have a clear interest in the determination of an emergency since they are injured by the illegal competition that results from an erroneous determinaton of an emergency. But, as discussed earlier in this opinion, competitive injury alone does not confer standing; the zone of interests test must also be met. The sound policy reasons for requiring satisfaction of the zone of interests test are particularly applicable to challenges based on statutes authorizing emergency action by administrative agencies.

The emergency provisions allow the Comptroller to act quickly to save a failing bank. Intervention by competing banks could only hamper this effort by causing delay and possibly needless exposure of the failing bank's condition. Such delay and exposure may alarm depositors of the failing bank and may undermine public confidence in the banking system as a whole. The determination that a bank is failing should inolve only the failing bank, its depositors and shareholders, and the Comptroller. Competitor banks are strangers to the failure determination, even though their competitive interests might be affected by eventual Comptroller action. We agree with Professor Stewart's analysis:

> Even in the strongest case for expansive standing — where the agency acts in flat violation of the governing statue — a stranger should not be permitted to challenge agency action. . . The abstract concern for

> vindicating the bare words of statutes seems too attenuated a justification for disturbing mutually satisfactory arrangements struck by all of the relevant public and private interests. Accordingly, even in the case of plain statutory violations, we should view officals as bearing duties solely to the various interests which the legislature had recognized as entitled to consideration.

Stewart, *Reformation of Administrative Law*, 88 Harv. L. Rev. 1667, 1736 (1975). Thus, we conclude that the risk of an erroneous determination of an emergency, and subsequent approval of an illegal branch, does not justify allowing competing banks to disrupt the mechanisms for dealing with failing banks.

2

In Count II of their amended complaint, plaintiffs allege that even if an emergency existed at Midland, the Comptroller violated §221.04(1)(j)2 by failing to offer to plaintiffs the opportunity to acquire Midland. But, as just discussed, plaintiffs are not within the geographical limitations of §221.04(1)(j)1. Only those banks within the geographical limits of §221.04(1)(j)1 are entitled to be offered the opportunity to purchase the failing bank and, consequently, have standing to contest the Comptrollers's failure to offer them that opportunity. Therefore, plaintiffs lack standing to contest the failure to give them an offer.

In summary, we hold that plaintiffs do not have standing to assert the branch banking claims contained in Counts I and II of their amended complaint. Plaintiffs are not within the zone of interests sought to be protected by the relevant statutes. Therefore, the district court's dismissal of these claims is affirmed.

III

In addition to the branch banking claims, plaintiffs alleged in their original complaint that the Comptroller had violated the Bank Holding Company Act ("BHCA") by failing to obtain prior approval of the Midland acquisition from the Board of Governors of the Federal Reserve System ("Board"). Plaintiffs argued that the purchase of Midland by First Bank was, in reality, a purchase by First Bank System, a bank holding company and, consequently, required the approval of the Board. The district court dismissed this claim on the ground that it lacked jurisdiction.

In order to purchase a bank, a bank holding company must obtain Board approval. 12 U.S.C. §1842(a). Pursuant to 12 U.S.C. §1842(d)(1), the Board may approve a bank holding company's purchase of assets of a bank outside the state in which total deposits of the bank holding company's banking subsidiaries are largest only if acquisition of such assets of a bank by an out-of-state bank holding company is specifically authorized by the statute laws of the state in which the bank is located.[21] Plaintiffs argue that since (1) Minnesota is the state where the total deposits of First Bank System's banking subsidiaries are greatest and (2) Wisconsin statutes do not permit the acquisition of banks located in Wisconsin by bank holding companies outside of Wisconsin, First Bank System could not acquire Midland directly. Thus, the purported acquisition of Midland by First Bank was, plaintiffs argue, a sham perpetrated by First Bank System in order to evade the prohibitions of 12 U.S.C. §1842(d).[22]

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[21] 12 U.S.C. §1842(d)(1) provides:

> Notwithstanding any other provision of this section, no application shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on July 1, 1966, or the date on which such company became a bank holding company, whichever is later, unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication. For the purposes of this section, the State in which the operations of a bank holding company's subsidiaries are principally conducted is that State in which total deposits of all such banking subsidiaries are largest.

Initially, we note that the restrictions in §1842(d) do not, on their face, apply here. Pursuant to 12 U.S.C.§1842(a)(4), prior Board approval is only necessary "for any bank holding company or subidiary thereof, *other than a bank*, to acquire all or substantially all of the assets of a bank" (emphasis added).[23] Since the transaction at issue was a purchase of the assets of a bank (Midland) by another *bank* (First Bank), not by a bank holding company, under the literal language of the statute, no application for approval from the Board was required. *See Leuthold v. Camp*, 273 F.Supp. 695, 702 (D.Mont. 1967), *aff'd*, 405 F.2d 499 (9th Cir.1969); *South Dakota v. Nat'l Bank of South Dakota*, 335 F.2d 444, 448-49 (8th Cir. 1964), *cert. denied*, 379 U.S.

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[22] In support of their charges, plaintiffs allege that as of June 1977, Midland had total assets of approximately $403,000,000, while First Bank had total deposits, as of December, 1976, of only $54,400,000. Plaintiffs argue that in view of the relative sizes of the banks, in addition to Midland's loan and capital problems, First Bank as an independent entity could not have acquired Midland or have provided the additional capital which the Comptroller had required Midland to obtain.

First Bank System, on the other hand, as of June, 1977, had total assets in excess of $7,900,000,000. In addition, in connection with the acquisition of Midland, First Bank System unconditionally guaranteed the performance of all obligations of First Bank under the purchase agreement with Midland; First Bank System provided $10,000,000 of additional capital to First Bank by purchasing additional common stock of First Bank; First Bank changed its name from "The National Bank of Wisconsin in LaCrosse" to reflect its affiliation with First Bank System; and defendants engaged in an extensive public advertising campaign describing the transaction in terms of Midland becoming "part of First Bank System."

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[23] Section 1842(a)(4) constitutes an allocation of agency responsibility between the Comptroller and the Board. Acquisition of a bank by a bank subsidiary of a bank holding company must be approved by the Comptroller under the Bank Merger Act, while acquisition of a bank directly by a bank holding company must be approved by the Board under the Bank Holding Company Act.

970 (1965) ("The words in the statute 'other than a bank' clearly show the intention of Congress not to require a bank acquiring the assets of another bank to obtain Board approval").

But, plaintiffs argue that regardless of the exception in 12 U.S.C. §1842(a)(4) to the requirement of Board approval, the Comptroller should have recognized that he had no jurisdiction to approve the Midland purchase because First Bank System, not First Bank, was the true purchaser of Midland. In other words, plaintiffs argue that we should "pierce the corporate veil" in order to prevent defendants from subverting the Congressional purpose behind §1842(d).

Defendants argue that the Comptroller does not have jurisdiction to determine whether the BHCA has been violated. They argue that any challenge to a transaction under the BHCA must be presented to the Board, whose decisions may be reviewed only in an appropriate court of appeals pursuant to 12 U.S.C. §1848. Therefore, defendants conclude, and the district court agreed, that the district court lacks jurisdiction to decide the merits of plaintiffs' claim that the Midland acquisition was a BHCA violation. We agree. Plaintiffs may bring a BHCA claim only before the Board.[24] They may not present their BHCA claim in the guise of a challenge to the Comptroller's discretion and authority.

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[24] Any party who is a potential competitor has standing to challenge orders of the Board or to intervene in Board proceedings. 12 U.S.C. §1850. Here, there is no Board order for plaintiffs to challenge. But the "Board order" provision has been interpreted by the Board as permitting a competitor to petition the Board for a formal ruling on an allegation that a bank or bank holding company is violating the BHCA. *See* "In re American Security and Trust Company," 39 Fed. Reg. 40898 (Nov. 21, 1974). Therefore, plaintiffs had an avenue for presenting their argument before the Board.

Plaintiffs argue that it would be futile to attempt to present the issue to the Board because the Board has consistently refused to review this type of transaction. In fact, Marshall & Ilsley informally inquired about the Midland transaction in a letter to the Board. By

The leading case in this confusing area of allocation of authority between the Comptroller and the Board, with review in the district court or court of appeals resptively, is *Whitney Nat'l Bank v. Bank of New Orleans*, 379 U.S. 411 (1965). In *Whitney*, a national bank in Louisiana wished to expand its operations through a new bank, but state branch banking law prohibited operation of a branch beyond its home parish. The bank attempted to solve its problem by organizing a bank holding company. The existing bank was to be merged into the holding company, which, in turn, would organize two banks, one consisting of the existing bank and the other consisting of the new bank in the neighboring parish. The net result was that the stockholders of the original bank would own the holding company, which in turn would own and operate both the original and new banks. The Board approved the plan over the objection of competing banks. The competitors sought judicial review of the Board's decision in the

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[24] (continued)

letter dated August 24, 1977, the Board's Secretary responded as follows:

> Although the transition [sic] had the effect of expanding the banking assets of First Bank System, section 3(a)(4) of the Bank Holding Company Act permits a bank subsidiary of a bank holding company to acquire substantially all of the assets of another bank without Board approval under the Bank Holding Company Act. In this case the Comptroller of the Currency approved the transaction after considering essentially the same factors that would have been considered by the Board of Governors, had the transaction required an application under section 3 of the Act.
>
> We do not believe that the limitations on the expansion of interstate bank holding companies were violated by the acquisition in question. Section 3(d) of the Bank Holding Company Act prohibits expansion of multistate bank holding companies only under circumstances in which Board approval would be required to do so. As pointed out above, no application under the Bank Holding Company Act was necessary in this case.

Plaintiffs' App. at 25. But, the Board's refusal to take any action under the BHCA has no effect upon the district court's jurisdiction, or lack thereof, over an alleged BHCA claim.

Fifth Circuit Court of Appeals, pursuant to 12 U.S.C. §1848.

Meanwhile, after the Board's approval of the plan, but before the filing of the suit in the court of appeals for review of the Board's decision, the competing banks filed a declaratory judgment action in the District of Columbia District Court. The competitors sought a declaration that the Comptroller had no power to grant the necessary certificate of authority for the proposed new bank because the bank holding company arrangement violated the BHCA. In that suit, both the district court and the District of Columbia Circuit Court of Appeals held that the new bank would be an illegal branch of the original bank. Consequently, the Comptroller was enjoined from issuing the certificate of authority to the new bank. As a result, the Board's order was essentially overruled by the action against the Comptroller.

The Supreme Court reversed, holding that since the BHCA gives the Board exclusive jurisdiction to approve bank holding company arrangements, [25] review of Board action must be pursued solely as provided in the BHCA — in the appropriate court of appeals. The Court, therefore ordered the suit involving the Comptroller dismissed.[26] The Court held not only that judicial review of Board action is available only as provided

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[25] In *Whitney*, as here, both branch banking and BHCA issues were raised. Plaintiffs' chief contention was that the organization of the bank holding company was unlawful because it allowed the formation of the new bank as a virtual branch of the old bank, contrary to state law. Plaintiffs also argued that state law prohibited subsidiaries of bank holding companies from opening. The Court noted that, with respect to both arguments, plaintiffs' "quarrel is in actuality not merely with the opening of the bank, but rather with its opening as a subsidiary of [the bank holding company]." 379 U.S. at 418.

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[26] The Court also stayed the issuance of its judgment for 60 days in order to allow the parties to return to the Fifth Circuit, which had reviewed the Board's order pursuant to 12 U.S.C. §1848, to secure a remand to the Board for further consideration of plaintiffs' claims. 379 U.S. at 425.

in the BHCA, but also that when the legality of a bank holding company's action is involved, any challenge must be brought initially before the Board. In other words, when Congress set up an exclusive judicial review procedure for Board determinations under the BHCA, it also evinced an intent that the Board always be the initial judge of BHCA issues:

> Here the Court of Appeals held that the relationship of Whitney-Jefferson to Whitney-New Orleans would be that of a branch bank notwithstanding the fact that they were organized under a bank holding company arrangement. The District Court found the proposal barred by Louisiana Act. No. 275 of 1962. *We believe that these are the very types of questions that Congress has committed to the Board, and we hold that the Board should make the determination of the plan's propriety in the first instance.* The soundness of this conclusion is especially evident when it is remembered that the Board has played a vital role in the development of the national banking laws, a role which makes its views of particular benefit to the courts where ultimately the validity of the arrangement will be tested.

379 U.S. at 421 (emphasis added).

Thus, *if* there really was a BHCA issue in this case, it could only be brought before the Board, not as a challenge to the Comptroller's authority to approve the transaction. To hold otherwise would allow a decision regarding the Comptroller's authority to force a particular interpretation of the BHCA on the Board without the issue being presented in the first instance to the Board.[27]

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[27] In some situations, it may be necssary for a court, on review of Comptroller action, to make an initial determination of whether a bank holding company is involved, so that Board involvement is appropriate. Although only the Board has jurisdiction to decide the merits of a BHCA issue, if the court finds that there is a substantial BHCA issue, it may be necessary to take action to preserve the issue for Board review. In *American Bank of Tulsa v. Smith*, 503 F.2d 784 (10th Cir. 1974), the court issued a 60 day stay of the Comptroller's

IV

For the foregoing reasons we find that the district court correctly dismissed both plaintiffs' original and amended complaints. The district court's judgment, therefore, is

AFFIRMED.

A true Copy:
· Teste:

Clerk of the United States Court
Of Appeals
For the Seventh Circuit

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[27] (continued)

issuance of a new bank's certificate of authority to do business in order to allow the parties to present allegations of a BHCA violation to the Board.

But in this case, the relief requested is divestiture by First Bank of the assets acquired from Midland almost four years ago, not merely a stay of the Comptroller's proposed action. Therefore, even if we found a substantial BHCA problem, it would be inappropriate to offer plaintiffs relief similar to that given in *American Bank of Tulsa* pending presentation of the BHCA issue to the Board.

We also note that even if some relief by way of a stay by the court was possible, plaintiffs have not raised a sufficiently substantial BHCA issue to warrant such "extraordinary use of court process." *American Bank of Tulsa*, 503 F.2d at 789. Plaintiffs' allegation of a BHCA violation is exactly like that rejected in *Leuthold v. Camp*, 273 F.Supp. at 702 (D.Mont. 1967), *aff'd.* 405 F.2d 499 (9th Cir. 1969), that "because what is done in terms of real ownership is so like what is prohibited, that what is done likewise should be prohibited." It is true that defendants First Bank and First Bank System took advantage of a "loophole" in the Bank Holding Company Act. But taking advantage of the loophole is not, by itself, enough to justify piercing the corporate veil. As stated by the court in *Leuthold v. Camp*, 273 F.Supp. at 702:

> The Act itself makes formal and perhaps arbitrary distinctions between asset and stock acquisitions, between bank and bank holding company acquisitions. Under these conditions it is the court's opinion that it should not, by disregarding the corporate forms, abolish the distinctions that Congress created.

See also South Dakota v. Nat'l Bank of South Dakota, 335 F.2d at 448-49 (8th Cir. 1964), *cert. denied*, 379 U.S. 970 (1965).

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APPENDIX B

ORDERS AND JUDGMENT OF UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

In the United States District Court
For the Western District of Wisconsin

Marshall & Ilsley Corporation, M&I Marshall & Ilsley Bank, The Marine Corporation, Marine National Exchange Bank of Milwaukee, Heritage Wisconsin Corporation, and Heritage Bank Milwaukee, Plaintiffs *v.* John G. Heimann, Comptroller of the Currency of the United States, First Bank (N.A.) and First Bank System, Inc., Defendants.

Order 78-C-42 Filed June 21, 1978.

Plaintiffs, national banks and bank holding companies with their principal offices in Milwaukee, Wisconsin, have brought this action for declaratory and injunctive relief, contending that defendant Heimann acted in violation of the law in permitting the acquisition of the assets and liabilities of the Midland National Bank of Milwaukee by defendant First Bank, a national bank located in LaCrosse, Wisconsin. Plaintiffs attack the action of the Comptroller on the grounds that (1) he failed to comply with the provisions of Wis. Stat. §221.04 and of 12 U.S.C. §36, before permitting defendant First Bank to establish a branch in Milwaukee through the acquisition of Midland's assets and liabilities and (2) he acted in excess of his statutory authority and without conformance to law in approving the acquisition of Midland's assets and liabilities by defendant First Bank under circumstances in which the acquisition was in reality an acquisition by defendant First Bank System, a bank holding company within the meaning of 12 U.S.C. §1842.

Plaintiffs allege that this action arises under 12 U.S.C. §§36, 81, and 181 (the National Bank Act); 12

U.S.C. §1828(c) of the Bank Merger Act; 12 U.S.C. §1842 of the Bank Holding Company Act; and 5 U.S.C. §§551,558, and 702 of the Administrative Procedure Act.

As relief, plaintiffs seek a declaratory judgment holding illegal the establishment and operation of a branch bank by defendant First Bank in Milwaukee, Wisconsin and holding illegal the acquisition of Midland's assets by defendants First Bank and First Bank System. In addition, plaintiffs seek injunctive relief requiring defendant First Bank to cease operation of a branch bank in Milwaukee and to divest itself of the banking assets acquired from Midland, by offering them to a person or persons other than defendant First Bank System or any of its subsidiaries or affiliates.

Defendants have moved for judgment on the pleadings or, alternatively, for summary judgment. Also, defendant Heimann has moved for a protective order which would have the effect of staying all discovery in this case until a determination has been made of the defendant's motions. He contends that plaintiffs are precluded from attacking the validity of the Midland acquisition because they lack standing, because this court does not have jurisdiction to hear the case, because plaintiffs claim is barred by laches, and because the record in the case establishes the reasonableness of the Comptroller's decision. He argues that it would be oppresssive and burdensome to permit plaintiffs to take further discovery of him or to begin discovery of the other defendants if the case is likely to be dismissed at a preliminary stage.

It is plain that the issues of standing and subject matter jurisdiction require no discovery of factual matters for their resolution. It is also plain that defendants' contentions regarding these issues are neither frivolous nor insubstantial. It will require more in the way of legal argument to rebut those contentions than the mere assertion that they are "clearly without merit," or that competitive banks have standing in any suit to challenge any decision of the Comptroller which involves branch banking.

It is defendants' position that plaintiffs lack standing because they allege no injury in fact, economic or otherwise, citing *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976); *Sierra Club v. Morton*, 405 U.S. 727 (1972); *cf.*, *Association of Data Processing Services Organizations v. Camp*, 397 U.S. 150 (1970). Defendants make the point that none of the plaintiffs has alleged that it had the ability to have acquired Midland's assets, that it would have acquired the assets had it been given the opportunity, or that it could have obtained the necessary regulatory approval to have made the acquisition. Defendants content that, in bringing this suit against an action of the Comptroller taken under statutes promulgated for remedial purposes, the plaintiffs cannot even assert that they are seeking to protect interests which fall within a "zone of interests to be protected" by the enactment of the statute. The remedial statutes are intended to protect the shareholders and depositors of a failing bank and not the competitors of the bank. In this respect, the plaintiffs may not be able to avail themselves of the standing afforded under those branch banking cases in which a plaintiff bank is challenging the creation of a new branch bank which, it can be presumed, will affect the economic interests of the competitor plaintiff.

It may be that plaintiffs can demonstrate their standing to prosecute this lawsuit. I do not mean to imply that they have no chance of success, particularly since they have not yet had a full opportunity to be heard on the issue. However, I am persuaded that the question is close enough as to make it reasonable to defer discovery until this preliminary issue has been decided.

Moreover, defendants have made a strong case in support of their argument that this court lacks jurisdiction to entertain a private suit under the Bank Holding Act. (Count II of the Complaint.) This preliminary matter should also be resolved before additional discovery is undertaken.

Defendants contend that the issue of laches involves no factual questions; that it is clear from the face of the complaint that plaintiffs have delayed unduly in bringing this suit and that it would prejudice defendant First Bank (and its shareholders and depositors) severely if the acquisition were to be declared invalid so long after its consummation. Plaintiffs contend that the question is a factual one, insofar as it relates to the prejudice or lack of prejudice which the defendant bank would suffer from a delay in the bringing of the litigation. I agree. I conclude that briefing on this issue should not be required until plaintiffs have had an opportunity to undertake at least limited discovery.

Whether discovery should be permitted with respect to the adequacy of the record before the Comptroller is a question which need not be resolved until there has been a determination of the threshold issues of standing and jurisdiction.

ORDER

IT IS ORDERED that

1) the motion of defendant Heimann for a protective order is GRANTED;

2) no discovery is to be undertaken by any party until the court has determined whether it has jurisdiction to entertain the suit or any part of it and whether the plaintiffs have standing to maintain the suit;

3) plaintiffs may have until July 21, 1978, in which to serve and file briefs in opposition to the motions of defendants to dismiss this action on the grounds that plaintiffs lack standing to sue and the court lacks jurisdiction over the subject matter of the suit; and

4) defendants may have until August 7, 1978, in which to serve and file briefs in reply to those of plaintiffs.

Entered this 21st day of June, 1978.

BARBARA B. CRABB
United States Magistrate

In the United States District Court
For the Western District of Wisconsin

Marshall & Ilsley Corporation, M&I Marshall & Ilsley Bank, The Marine Corporation, Marine National Exchange Bank of Milwaukee, Heritage Wisconsin Corporation, and Heritage Bank Milwaukee, Plaintiffs *v.* John G. Heimann, Comptroller of the Currency of the United States, First Bank (N.A.) and First Bank System, Inc., Defendants.

Order 78-C-42 Filed September 18, 1978.

This is a civil action for declaratory and injunctive relief, brought by three national banks and the holding companies of those banks against another national bank and its holding company and the Comptroller of the Currency. The case arises out of the purchase by the defendant bank of the assets and liabilities of the allegedly failing Midland Bank in Milwaukee, Wisconsin, a purchase engineered and approved by the defendant Comptroller.

Plaintiffs attack the actions of the Comptroller on the grounds that (1) he failed to comply with the provisions of Wis. Stat. §221.04 and of 12 U.S.C. §36, before permitting defendant First Bank to establish a branch in Milwaukee through the acquisition of Midland's assets and liabilities and (2) he acted in excess of his statutory authority and without conformance to law in approving the acquisition of Midland's assets and liabilities by defendant First Bank under circumstances in which the acquisition was in reality an acquisition by defendant First Bank System, a bank holding company within the meaning of 12 U.S.C. §1842.

Plaintiffs allege that this action arises under 12 U.S.C. §§36, 81 and 181 (the National Bank Act); 12 U.S.C. §1828(c) of the Bank Merger Act; 12 U.S.C. §1842 of the Bank Holding Company Act; and 5 U.S.C §§551, 558, and 702 of the Administrative Procedure Act.

As relief, plaintiffs seek a declaratory judgment holding illegal the establishment and operation of a branch bank by defendant First Bank in Milwaukee, Wisconsin and holding illegal the acquisition of Midland's assets by defendants First Bank and First Bank System. In addition, plaintiffs seek injunctive relief requiring defendant First Bank to cease operation of a branch bank in Milwaukee and to divest itself of the banking assets acquired from Midland, by offering them to a person or persons other than defendant First Bank System or any of its subsidiaries or affiliates.

Presently before the court are defendants' motions for judgment on the pleadings. Defendants contend that plaintiffs have no standing to bring this action and that the court lacks subject matter jurisdiction.

Other defenses raised by defendants have been held in abeyance pending a decision on the threshhold jurisdiction issues.

Standing

Defendants contend that plaintiffs have no standing to sue because they have alleged no injury in fact. Plaintiffs counter with the assertions that they have standing because they are competitors[1] of the Midland Bank and because they were denied their statutory right to consider the purchase of the Midland Bank.

The doctrine of "standing" arises from the provision in Article III of the United States Constitution that the judicial power of the federal court extends to "cases" and to "controversies." This case and controversy provision has been interpreted as restricting the jurisdiction of the federal courts to matters which are "ripe" for adjudication, *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); to lawsuits which raise issues which are neither "frivolous" nor "unsubstantial," *Bell v. Hood*, 327 U.S. 678 (1946); to cases which seek remedies which would be of actual, present benefit to the claimants, *DeFunis v. Odegard*, 416 U.S. 312 (1974); *Golden v. Zwickler*, 394 U.S. 103 (1969); as well as to litigation in which the litigants have a personal stake in the outcome of the action, *Baker v. Carr*, 369 U.S. 186 (1962).

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[1] Plaintiffs make this assertion in their briefs. Nowhere in the complaint is there any allegation to the effect that plaintiffs, or any of them, are competitors of the old or new Midland Bank.

Although the concepts of "ripeness," "nonfrivolousness," "mootness," and "standing" have a common source in a concern for the conservation of judicial resources and a general aversion to judicial intervention in matters which do not represent immediate, continuing, and real disputes. *See, e.g., Lake Carriers' Ass'n v. MacMullen*, 406 U.S. 498, 506 (1972), each of the concepts has tended to develop a life and complexity of its own. In particular, standing became for a long time, "a complicated specialty of federal jurisdiction." *United States ex rel. Chapman v. FPC*, 345 U.S. 153, 156, (1953); "an area of incredible complexity," *Scanwell Laboratories v. Shaffer*, 424 F.2d 859, 861 (D.C. Cir. 1970).[2]

In recent years, however, the Supreme Court has discarded the subtle and complex test for standing which it had fashioned earlier. In *Ass'n of Data Processing Serv. Organizations v. Camp*, 397 U.S. 150 (1970), the Supreme Court renounced the "legal right" theory of standing for a "zone of interests" test which has been abandoned, in turn. Under the legal right theory, a litigant was required to show that the challenged governmental action[3] invaded a legal right of the litigant, — one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." *Tennessee Power Co. v. TVA*, 306 U.S. 118 (1939).

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[2] The opinion in the *Scanwell Laboratories* case contains an extensive review of the history of the standing requirement up to 1970.

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[3] The law of standing arises almost exclusively in connection with challenges to the validity of governmental action. "The person suing for breach of contract or for a tort must satisfy the court that he has standing to bring such a suit, but in practice such suits are brought only by a person harmed by the supposed wrong, and his standing to sue is self evident." Wright, Law of Federal Courts, 43 (3d ed. 1976).

Under the "zone of interests" test, the litigant was required to make two showings: that the challenged action had caused the litigant injury in fact and that the interest at stake in the lawsuit was one "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. *Id.*, at 152-153; *Barlow v. Collins*, 397 U.S. 159 (1970). Because the Court has neither applied nor discussed the "zone test" since 1970, and few, if any, lower federal courts have relied upon it to grant or deny standing, it is doubtful that it has any continuing validity. See, discussion in Davis, Administrative Law of the Seventies, 509-516 (1976); Davis, Administrative Law Treatise, 1970 Supplement, 702-722 (1971). In the *Data Processing* and *Barlow* cases, the zone test was used to expand the group of persons who would have standing to contest the legality of certain governmental actions (although reliance on the concomitant test of "injury in fact" would have produced the same result). The Court may not have considered that the application of the zone test might work to *deny* standing to persons who were injured in fact.[4] In any event, the absence of any mention of the test since 1970 indicates that it is no longer viable. Moreover, it is plain that the zone test was never intended to be a substitute for the showing of injury or adverse effect. *See, e.g., Martin-Trigona v. Federal Reserve Board*, 509 F.2d 363, 367 (D.C. Cir. 1975).

The present state of the law is this: the requirement of "standing" is satisfied by the showing of an injury in fact, economic or otherwise. *Sierra Club v. Morton*, 405 U.S. 727 (1972). Litigants need not establish that they have a legally-recognized right to be heard or that they come within any "zone of interests." The injury need not be substantial, but it must be identifiable, concrete and non-speculative. *United States v. S.C.R.A.P.*, 412 U.S. 669 (1973); *cf., Warth v. Seldin*, 422 U.S. 490 (1975);

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[4] The zone of interests test has been the subject of much criticism by Professor Davis. See, *particularly*, Davis, Administrative Law Treatise, 1970 Supplement, 710-722 (1971).

O'Shea v. Littleton, 414 U.S. 488 (1974); *Public Citizen v. Lockheed Aircraft Corp.*, 565 F.2d 708, 716 (D.C. Cir. 1977). Additionally, standing may be conferred by statute. Although Congress is without power to expand the jurisdiction given the federal courts under Article III of the Constitution, "Congress may enact statutes creating legal rights, the invasion of which confers standing, even though no injury would exist without the statute." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617, n.3 (1973).

In short, for standing purposes, plaintiffs need show only that the actions of defendants have caused them some identifiable injury or that they have standing under a specific statute or both. Despite defendant's assertions to the contrary, we conclude that plaintiffs need not demonstrate that they are within the "zone of interests" of the statutes on which they ground their action.

1. Standing Grounded Upon a Showing of Injury.

Oddly enough, plaintiffs' pleadings include no allegations of any injury, harm, or adverse effect, economic or otherwise, upon plaintiffs. Plaintiffs have alleged no facts concerning the state of banking competition in Milwaukee prior to the Midland sale, the relative positions in the market of the plaintiff banks and of Midland Bank, or the plaintiffs banks' ability to compete with Midland. They have said nothing about the market in which the plaintiff holding companies might compete with the defendant holding company or about the competitive advantages to be gained by a holding company which acquires an indirect interest in a bank the size of Midland, with a significant share of a large metropolitan market in which the holding company had no prior subsidiary. Most notably, plaintiffs have failed to specify the precise nature of their competition with the defendants. It is unlikely that the plaintiff banks could be said to compete with the defendant holding company or the plaintiff holding companies with the defendant bank.

It is probable that as a result of the Comptroller's actions, Midland Bank is now a stronger, more aggressive bank than it was prior to June 1977. It is not inconceivable that the plaintiff banks could anticipate (and allege) suffering adverse economic effects as a consequence of having to compete with a stronger, more aggressive bank rather than a weak, and possibly failing, bank. It is possible that the plaintiff holding companies might anticipate, or realize, adverse economic effects as a consequence of having to compete with a larger and more diversified holding company.

For reasons of their own,[5] plaintiffs have not made any allegations of adverse economic effect. The sum total of the allegations they have made is the following: that plaintiffs are interested; that they have suffered a legal wrong; that they are adversely affected and aggrieved because the Comptroller permitted the acquisition of Midland Bank and the establishment and operation of a branch bank in Milwaukee by the defendant bank, while denying plaintiffs the same or similar opportunities; and that the Comptroller's actions have created a double standard under which special rights and privileges were granted to the defendant bank and holding company. The complaint is devoid of any allegations which would add more specificity to these general and conclusory allegations of adverse effect. Not only is there missing the allegation that plaintiffs, or any of them, compete with Midland or with the defendant bank or holding company, plaintiffs do not describe the physical locations of the plaintiff banks in relation to Midland; nor do they attempt to describe the competitive positions of the plaintiff banks with respect to Midland.

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[5] Those reasons may include a reluctance to state publicly any allegation that plaintiffs have suffered or expect to suffer adverse economic consequences, whether these are a reduction of actual earnings; a reduction of anticipated earnings growth; or a reduction of market share. Also, since plaintiffs are challenging the Comptroller's decision that Midland's financial condition required emergency measures, it is understandable that they might not wish to include any allegations which might be read as agreeing with the Comptroller.

Even if it is assumed that the plaintiffs are competitors of the defendant bank and holding company, it does not follow from that status alone that they have suffered any actual harm from any actions of defendants. Plaintiffs' citations of cases giving standing by competitors to challenge new bank branches or new forms of competition are inapposite. In the cited cases, an adverse economic effect upon the plaintiff can be readily inferred from the factual setting of the case. As plaintiffs note, the courts have had no difficulty in finding the standing requirement met by a litigant challenging either the establishment of a new branch bank, drive-in facility, off-premises computer terminal or the entry of a bank into a new field of activity, such as investment advising or data processing. *See, e.g., Bank of Dearborn v. Saxon*, 244 F. Supp. 394 (E.D. Mich. 1965); *Marion Nat'l Bank v. Van Buren Bank* 418 F.2d 121 (7th Cir. 1969); *First Nat'l Bank of Smithfield v. Saxon*, 352 F.2d 267 (4th Cir. 1965); *Seattle Trust & Savings Bank v. Bank of California*, 492 F.2d 48 (9th Cir. 1974), *cert. den.* 419 U.S. 844 (1974); *Ass'n of Data Processing Serv. Organizations v. Camp, supra; Investment Company Inst. v. Camp*, 401 U.S. 617 (1971). The courts have been willing to assume that the pre-existing banks were adversely affected by entry of a new competitor into a given geographical area or into a new line of business.[6] This is not the situation alleged in plaintiffs' complaint. Plaintiffs are challenging the change of ownership of an existing bank. Whether the change works an identifiable, adverse injury upon plaintiffs is not something which can be assumed from the situation itself or inferred from plaintiffs' allegations.

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[6] In the *First Nat'l Bank of Smithfield* case, the court of appeals held that the competitors of a bank had standing to challenge a decision of the Comptroller approving the bank's establishment of a branch,

With respect to the claim that they were injured because the Comptroller did not provide plaintiffs with an opportunity equal to that provided the defendant bank to consider a purchase of Midland's assets and liabilities, plaintiffs have not alleged that any adverse consequence flowed from such failure. None of the plaintiffs has alleged that it would have accepted a proposal from the Comptroller to purchase Midland. Plaintiffs allege only that, under the Wisconsin statutes, they were entitled to be offered an opportunity to acquire Midland. Without a showing of injury, plaintiffs' claim is a mere allegation of illegality which does not give them standing. Plaintiffs allege that they are interested and have suffered a legal wrong, but mere interest in the righting of a legal wrong is not an adequate substitute for the requirement that a litigant demonstrate personal, concrete injury, "no matter how compelling, no matter how vigorously and vocally expressed." *Mulqueeny v. National Com'n on the Observance of Int'l Women's Year*, 549 F.2d 1115, 1121 (7th Cir. 1977).

It is doubtful whether plaintiffs can allege injury with respect to their claim. Clearly, they cannot claim to have been injured by the denial of the opportunity

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[6] (continued)

> "not because of the potential sharpening of competition, but because they have an immediate concern, apart from the public generally, to prevent an approval contrary to law. Thus, they are 'interested' within the purpose of §1004(b), APA."

First Nat'l Bank of Smithfield v. Saxon, 352 F.2d 267, 269 (4th Cir. 1965). It is not clear what the court found to be the competitors' "immediate concern" if it was not the sharpened competition. If the court intended to hold that a particularized "interest" could confer standing in the absence of actual or anticipated injury, that has been overruled effectively by *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Independent Bankers Ass'n v. Saxon*, 402 F. Supp. 207 (D.D.C. 1975), aff'd 534 F.2d 921, *cert. den.* 429 U.S. 862 (1976); *Mulqueeny v. National Comm'n on the Observance of Int'l Women's Year*, 549 F.2d 1115 (7th Cir. 1977).

unless they can allege that they might have availed themselves of an opportunity to purchase Midland.

Plaintiffs assert that they do not have enough information now about Midland's situation prior to the purchase or about the terms of the Comptroller's offer to enable them to determine whether they could have acquired Midland. This assertion is unpersuasive. Surely plaintiffs know enough about their own assets and liabilities and their relative positions in the Milwaukee market as of July 23, 1977, to enable them to make an informed evaluation of the likelihood of any of them acquiring Midland under any circumstances. It is significant that plaintiffs do not seek as relief even the opportunity to consider the acquisition of Midland by any one of them.

In summary, it seems unlikely that plaintiffs could show that they have suffered actual injury by the Comptroller's failure to provide them with an opportunity to consider the acquisition of Midland; it is possible that plaintiffs could establish that they have suffered or expect to suffer an economic injury by the Comptroller's intervention into the Milwaukee banking field by alleging facts tending to show that as a consequence of his action, there was an improvement in Midland's ability to compete with the plaintiff banks and tending to show that the defendant holding company gained a competitive advantage over the plaintiff holding companies.

The question is whether the court should construe the complaint as alleging the adverse effect necessary to give plaintiffs standing. We think not. Such a construction would require so much speculation as to make it doubtful that the construction would match the plaintiffs' intentions. Plaintiffs are represented by competent, experienced lawyers. *Cf.*, *Haines v. Kerner*, 404 U.S. 519 (1972). Given an opportunity to amend, plaintiffs should be able to make a showing of adverse effect, if, in fact, they have suffered any.

One additional argument concerning plaintiffs' standing should be noted.

Defendants contend that plaintiffs lack standing not only because they have failed to allege any actual injury, but also because they are unable to show how any remedy will be of benefit to them. In support of this contention they have cited *Warth v. Seldin, supra*, and *Linda R. S. v. Richard D.*, 410 U.S. 614 (1973), cases in which the United States Supreme Court denied standing to litigants who were unable to show that they would receive any practical benefit from the relief they sought. Both cases are somewhat anomalous. Ordinarily, the question of whether a litigant will gain any present "benefit" from the remedy he seeks is an aspect of mootness rather than of standing. In the cited cases, it was used by the Court to analyze the connection between plaintiffs' injury and the governmental act or ommission. In *Linda R.S.*, for example, the plaintiff alleged that as the mother of an illegitimate child for whom the father had refused to make support payments, she was injured by the refusal of the district attorney to initiate criminal prosecutions against illegitimate fathers. The Court held that plaintiff lacked standing, reasoning that plaintiff's injury did not result from any governmental act or omission, but from the failure of her child's father to make support, and that requiring the district attorney to initiate a criminal proceeding would result in the father's incarceration rather than in financial support for plaintiff's child. On this assumption, the Court held that plaintiff's stake in the litigation was too nebulous to give her standing to sue the prosecutor. In *Warth*, the Court held that low- and moderate- income persons excluded from living in the town of Penfield, New York had no standing to challenge the town's zoning ordinance because they were unable to show that their inability to live in Penfield resulted from the town's restrictive zoning practices and that, without such practices, they would have been able to rent or purchase housing accommodations in Penfield.

Neither of these cases is entirely apposite to that before the court. In this case, if there is an economic injury to plaintiffs from the sale of Midland's assets, it is readily attributable to the Comptroller's actions in arranging and allowing the sale. However, the defendants' contention is pertinent.

In its present form, the complaint seeks as relief a divestiture of Midland from defendant First Bank and a transfer to another person or persons. What beneficial effect this would have upon plaintiffs as supposed competitors of Midland is left unexplained. Presumably, neither the Comptroller nor any other responsible agency would approve a transfer of Midland to any entity which did not have financial and management resources to make it a strong competitive factor in the Milwaukee banking field. Presumably, therefore, there would be no economic benefit to plaintiffs, other than that which might result from a period of uncertainty over Midland's ownership.

Since the parties have not had an opportunity to brief the question of mootness, it would be inappropriate to discuss it here at any length, except to note that it appears from the complaint that plaintiffs may be unable to show that they will benefit in any real way from the relief they seek. In that event, the case may be subject to dismissal on the court's own motion, with respect to the claims that concern the ability of the plaintiff banks to compete with Midland.

2. Standing Conferred by Statute.

A second possible source of standing for plaintiffs is statutory. Plaintiffs seem to be alleging in their briefs that they have standing pursuant to Wis. Stats. §221.04(1)(j) as incorporated into 12 U.S.C. §36(c). Their position is that, read together, these two statutes require the Comptroller to observe the geographical branch banking restrictions of the Wisconsin law, unless there is an emergency situation in which case an opportunity to merge or consolidate with the failing bank must have been offered to "all other banks within the geographical limits of [Wis. Stats. §221.04(j)] subd. 1." Plaintiffs contend that, as banks within the geographical limits of subdivision 1, they and all other banks in the area should have been offered an opportunity to merge or consolidate with Midland, before the Comptroller could allow Midland to become a branch of a LaCrosse bank. Further, they contend that this statute gives them standing to challenge the Comptroller's failure to make the offers. Like the statutory language allegedly supporting it, this proposition is far from clear. As the defendant bank and holding company point out, it is impossible to tell from subdivision 1 of the Wisconsin Statute what banks would be considered to be "within the geographical limits" of the subdivision.[7]

However, even if it is assumed that the plaintiff banks would be banks within the geographical limits, it does not follow that they derive standing from the statute. Assuming for the purpose of discussion that the plaintiffs could derive standing from a showing that the Comptroller has invaded a right created in them by a state statute, it must be determined whether the state statute creates the legal right asserted by plaintiff banks. We conclude that it does not.

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[7] Under subdivision 1, a branch bank may be established in a nonemergency situation only if the branch meets all of the following conditions:

(a) The branch is "located in the same county in which the home bank is located or in a contiguous county if the location of such branch bank is no more than 25 miles from the home bank;"
(b) The branch is "in a municipality other than that in which the home bank is located;"
(c) The branch is in a municipality which "has no bank or branch bank at the time of application;" and
(d) "[N]o bank or branch bank is located within a radius of 3 miles from the proposed site of the branch."

The defendant Comptroller has construed the statute as referring to all banks within a 3-mile radius of the merging bank.

If the Wisconsin statute is interpreted as requiring the Comptroller to offer all of the banks in the area an opportunity to merge or consolidate with a failing bank before he may approve an arrangement making a failing bank a branch of a bank outside the geographical limits, the state statute would conflict with the federal banking laws governing failing banks which are designed to give the Comptroller the ability to move quickly to save failing banks. Under the supremacy clause, the state statute would be of no effect. *Easton v. Iowa*, 188 U.S. 220 (1903); *Davis v. Elmira Savings Bank*, 161 U.S. 275 (1896). More likely, as the defendant bank and holding company suggest, the procedural provisions in subdivision 2 of Wis. Stats. §221.04(j) would be held not to be "restrictions as to locations" and therefore, not binding upon the Comptroller under 12 U.S.C. §36(c). In either event, the statute cannot be held to confer a right upon the plaintiff banks, the violation of which gives them standing to sue in a federal court.

Subject Matter Jurisdiction

In Claim II of their complaint, plaintiffs allege that the Comptroller violated the Bank Holding Company Act by failing to obtain prior approval by the Federal Reserve Board of the Midland acquisition. Such approval is required when a bank or its assets are acquired by a bank holding company; it is not required when the acquiring entity is another bank. 12 U.S.C. §1842(a). It is plaintiffs' contention that in Midland's case, the acquisition by defendant First Bank is a sham for what is actually a purchase by defendant First Bank System and that because it is such an obvious subterfuge for avoidance of the requirement of prior Federal Reserve Board approval, the proposed acquisition should have been presented to the Federal Reserve Board.

Defendants have moved to dismiss this claim on the ground that the court lacks jurisdiction over any claim by plaintiffs that the actions of the Comptroller violated the Bank Holding Company Act.

The Bank Holding Company Act is a discrete section of the federal banking laws, directed to regulation of the ownership and control of state and national banks by holding companies. The Act commits to the Federal Reserve Board the authority to review and approve, or disapprove, projected acquisitions of banks by any entity other than another bank. 12 U.S.C. §1842. Under the Act, companies other than banks must obtain approval by the Board prior to taking an action which is in the nature of a bank acquisition, an assets acquisiton, or reorganization into a bank holding company. Denial of approval is appealable to the federal courts of appeals.

The Act provides criminal penalties for willful violations of any provision or of any regulation or order issued by the Board pursuant to the Act. 12 U.S.C §1847. Additionally, the Board has been given authority to issue temporary or permanent orders directing holding companies to cease and desist from unsafe or unsound practices in conducting the business of a bank or from violating any law, rule, or regulation. 12 U.S.C §1818(b)(3).

Plaintiffs argue that they can maintain a private action in federal district court against the Comptroller under this Act. Their argument is three-pronged: 1. Under the standards set out in *Cort v. Ash*, 422 U.S. 66 (1966), a private cause of action is properly inferred from the criminal provisions of the Act. 2. Because the Federal Reserve Board never made a decision in the Midland case, their action is not a challenge to a Board decision requiring them to pursue their administrative remedies. 3. They are not suing the Board for a failure to act, but are suing the Comptroller for his failure to take an action required of him under the Act.

Defendants contend that the statutory remedies are exclusive; that *Cort v. Ash* does not support a finding that a private cause of action should be read into the Bank Holding Company Act; that, although there are provisions for administrative review of the validity of bank acquisitions, there is no provision, express or implied, for a private civil action against the Comptroller. We agree.

In *Cort v. Ash*, *supra*, the Supreme Court analyzed the factors to be considered by federal courts when implying a remedy for a plaintiff under a federal statute. These elements include the following: (1) whether the plaintiff is one of the class of persons for whose "especial" benefit the statute was enacted; (2) whether there is any indication, either explicit or implicit, of a legislative intent to create such a remedy; (3) whether judicial implication is consistent with the underlying purposes of the legislative scheme; and (4) whether the particular cause of action is traditionally relegated to state law. *Id.*, at 78.

Plaintiffs argue that they are of the "class of persons for whose "especial" benefit the Bank Holding Company Act was intended. The proposition is not self-evident. It appears more likely that one class of beneficiaries was to be the members of the public who could be presumed to benefit from the increased competition possible if banking concentrations were avoided. If there is any small group of persons for whose benefit the Act was intended, it is the independent banks; a class which would not include these plaintiff banks which are themselves part of holding companies. In no event is it likely that holding companies were intended to be "special beneficiaries" of this legislation. Such a reading of the statute is belied by plaintiffs' own citations of legislative history, which include a reference to the special concern of the Senate for saving independent banks from destruction by competition with holding companies.

Plaintiffs contend that the legislative history of the Act indicates that competing banks have a civil remedy to enforce the prohibitions. If by this plaintiffs mean that competing banks may participate in hearings before the Board and may obtain judicial review in the courts of appeals of Board orders and rulings, they are correct. They are wrong if they read the Act as permitting competing banks to initiate actions under the Act in the federal district courts.

In *Whitney Nat'l Bank v. Bank of New Orleans*, 379 U.S. 411 (1965), the Supreme Court reviewed the statutory scheme of the Bank Holding Company Act, concluding that Congress had intended "that challenged to Board approval of the organization and operation of a new bank by a bank holding company be pursued solely as provided in the statute." At 420. The Court found the comprehensive scheme of the Act to be evidence of a congressional intent to delegate to the Federal Reserve Board the specialized questions concerning bank holding company expansion and its ramifications. The Board's denial or grant of approval to an application is binding upon the Comptroller; its decisions are reviewable by the courts on appeal only to the extent of determining whether substantial evidence exists to support the decision.

The *Whitney* opinion refutes plaintiffs' contentions that there is a legislative intent to create a private remedy under the Holding Company Act and that judicial implication of such a remedy would be consistent with the underlying purposes of the Act. *South Dakota v. National Bank of South Dakota*, 335 F.2d 444 (8th Cir. 1964), *cert. den.* 379 U.S. 970 (1965).

The second prong of plaintiffs' argument is that they are not required to pursue their remedies administratively, because they are not attacking a Board decision, but rather the Comptroller's failure to give the Board the opportunity to make a decision on the legality of the Midland acquisition.

12 U.S.C. §1850 confers standing to challenge orders of the Board or to intervene in Board proceedings upon any party who is a potential competitor. This provision has been interpreted by the Board as permitting a competitor to petition the Board for a formal ruling on an

allegation that a bank or holding company is violating the Bank Holding Company Act. *See*, "In re American Security and Trust Company," 39 Fed. Reg. 40898 (Nov. 21, 1974).

Since there is an administrative procedure which plaintiffs could have pursued to challenge defendants' failure to obtain prior Federal Reserve Board approval of the Midland acquisition and since the challenge raises the very kinds of questions which Congress has committed to the Federal Reserve Board for determination, namely, whether a transaction is in fact an acquisition subject to the Bank Holding Company Act, and, if it is, whether the acquisition can be permitted under the act and related regulatory statutes, it would seem that plaintiffs should seek administrative review before initiating a lawsuit.

In the Whitney Bank case, the Supreme Court said that "To permit a district court to make the initial determination of a plan's propriety would substantially decrease the effectiveness of the statutory design." Although in *Whitney* the Court was considering a challenge to an alleged branch banking plan, its statement is equally valid with respect to an allegation that a particular acquisition is violative of the Act. No decision as to the propriety of the Comptroller's actions can be made without an initial determination of the propriety of the acquisition by the defendant First Bank. Thus, we conclude that plaintiffs must pursue their claim under the Bank Holding Company Act before the Federal Reserve Board and that they are precluded from initiating a private lawsuit under the Act in a federal district court. The cases cited by plaintiffs do not compel a different conclusion.

Even if we were to conclude that plaintiffs could properly seek in this Court to mandamus the Comptroller, which they do not, their failure to pursue the administrative remedies available to them under the Bank Holding Company Act would preclude mandamus relief. If they had pursued or were to pursue administrative review by the Federal Reserve Board, any appeal from the Board's decision would be to the Court of Appeals and not to this Court. Accordingly, we see no possible basis for jurisdiction here on the subject matter of plaintiffs' complaint.

Finally, the fact that Claim II of the complaint is directed toward the Comptroller and not to the Federal Reserve Board does not support the plaintiffs' contentions that they need not seek administrative review of the Midland acquisition prior to obtaining review in the courts.

ORDER

On the basis of the foregoing discussion, IT IS ORDERED that defendants' motions to dismiss for plaintiffs' lack of standing and failure to state a claim are granted, and the complaint is dismissed, without prejudice and without costs with respect to Claim I of the complaint; with prejudice and with costs with respect to Claim II of the complaint. Plaintiffs may have twenty days within which to amend their complaint.

BY THE COURT

Hubert Will
District Judge

September 16, 1978

In the United States District Court
For the Western District of Wisconsin

Marshall & Ilsley Corporation, et al
Plaintiffs,
vs.
John G. Heimann, et al
Defendant.

Judgment 78-C-42 Filed June 30, 1980

This action came on for consideration before the Court, Honorable Hubert L. Will, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered.

It is Ordered and Adjudged that defendants' motions to dismiss the amended complaint are granted with respect to counts I and II of plaintiffs amended complaint.

Dated at Madison, Wisconsin this 30th day of June 1980.

Clerk of Court

In the United States District Court
For the Western District of Wisconsin

Marshall & Ilsley Corporation, M&I Marshall & Ilsley Bank, The Marine Corporation, Marine National Exchange Bank of Milwaukee, Heritage Wisconsin Corporation, and Heritage Bank Milwaukee, Plaintiffs, *v.* John G. Heimann, Comptroller of the Currency of the United States, First Bank (N.A.) and First Bank System, Inc., Defendants.

Order 78-C-42 Filed June 30, 1980

This cause comes before the Court on the motions of defendant John G. Heimann, Comptroller of the Currency of the United States, and defendants First Bank (N.A.) and First Bank System, Inc. to dismiss plaintiffs' amended complaint or, in the alternative, for summary judgment. For the reasons hereinafter stated, we grant defendants' motions to dismiss on the ground that plaintiffs lack standing to maintain their action and do not reach the merits of the motions for summary judgment.

BACKGROUND

Plaintiffs' original complaint in this action was brought in two counts. In Count I, plaintiffs alleged that Heimann had failed to comply with the provisions of Wis. Stat. §221.04 and 12U.S.C §36 in permitting First Bank to establish a branch in Milwaukee through the acquisition of Midland Bank's (Midland) assets and liabilities. In Count II, plaintiffs alleged that Heimann violated the Bank Holding Company Act by failing to obtain prior approval by the Federal Reserve Board of the Midland acquisition.

In our opinion of September 16, 1978, we granted defendants' motion to dismiss both counts of the original complaint. We dismissed Count I without prejudice, concluding that the plaintiffs lacked standing with respect to either of their claims in that count. First, as to plaintiffs' claim that Heimann had acted improperly by permitting the acquisition of Midland Bank and by allowing First Bank to operate the former Midland facility as a branch bank, we concluded that plaintiffs' complaint was devoid of any allegations of injury, harm, or adverse effect, whether economic or otherwise, and that their complaint must be dismissed for lack of standing. Second, as to plaintiffs' claim that Heimann had failed to provide plaintiffs with an opportunity equal to that provided to First Bank to acquire Midlands' operations, we concluded both that plaintiffs had failed adequately to allege any injury from this failure and that Wis. Stat. §221.04(1)(j)2, relied upon by plaintiffs, did not confer any right upon the plaintiffs to have the assets of Midland offered to them prior to the sale to First Bank. We also dismissed Count II with prejudice, holding that no private right of action against the Comptroller could either be expressly or impliedly derived from the Bank Holding Act.

Subsequent to our order, plaintiffs filed the amended complaint currently before us. In essence, the amended complaint sets forth in two counts the two claims which had previously been joined in Count I of the original complaint. Thus, Count I alleges that Heimann's actions in allowing First Bank to acquire Midland's assets and to operate the former Midland facility as a branch bank were in violation of 12 U.SC. §36 and Wis. Stat. §221.04(l)(J) in that there was no "emergency" at the time Heimann acted. Count II alleges that, assuming there was an emergency, Heimann acted improperly under the mandates of Wis. Stat. §221.04(l)(j)2 by failing to first offer them the opportunity to acquire the Midland assets and facility.

Subsequent to the filing of the amended complaint, defendants filed the instant motions to dismiss or, in the alternative, for summary judgment. Since the issues raised by these motions differ with respect to each count of the amended complaint, each count will be considered separately.

COUNT I

In Count I, plaintiffs allege that the plaintiff banks and Midland are located within the same city and county and are within a one-half mile radius of each other; that as of June 30, 1977, Midland had total assets of $403,000,000 and was in competition with plaintiff banks for banking and other services; that on July 23, 1977, defendant Heimann approved the application of defendant First Bank to purchase the assets and assume the liabilities of Midland; and that thereafter defendant First Bank "has operated the Milwaukee office as a branch bank, and as such engaged in competition from such location with the plaintiff banks for banking business and other services rendered by commercial banking institutions." Plaintiffs further allege that Heimann's actions were in violation of 12 U.S.C. §36, which permits the establishment of a branch of a national bank only if such establishment would be permitted a state bank by the law of the state in which the branch is to be located, and of Wis. Stat. §§221.04(l)(f) and (j)l, which prohibits the establishment of a branch by a state bank outside of the county in which the home bank is located, or more than twenty-five miles from the home bank if in a contiguous county. Plaintiffs contend that the restrictions on branching apply equally whether the branch is the result of an acquisition of an existing bank or the creation of an additional new office of an existing bank.

Plaintiffs acknowledge the existence of an exemption to this provision contained in §221.04(l)(j)2, in the case of a failing bank, but they allege that Midland was neither failing nor in an emergency situation. As a direct and proximate result of the foregoing wrongful actions, plaintiffs allege that "they have been irreparably injured" in these respects:

> (a) First Bank System and First Bank were permitted to establish a branch bank office in the immediate proximity of plaintiffs and thereby to compete with plaintiffs through a Milwaukee office in direct violation of the laws regulating branch bank locations; (b) First Bank System and First Bank were permitted to expand their commercial banking operations into the Milwaukee market and business area which is substantially removed from their prior areas of operation, while similar expansion opportunities are denied to plaintiffs; and (c) the Comptroller's action created a double standard under which special rights and privileges have been granted to First Bank and First Bank System which are contrary to law, thereby enabling First Bank System to create illeg-

> ally a multi-state affiliation of banking institutions with total assets substantially exceeding the combined assets of all plaintiffs.

Cpt. ¶27.

While the allegations of the amended complaint have been substantially improved over the original complaint, particularly with reference to the allegations that plaintiffs and defendant First Bank (through the operation of the Midland office) are in competition with each other, plaintiffs' amended complaint still contains no allegation of any concrete or identifiable injury, whether economic or otherwise, caused them by the defendants' acts unless competition itself is somehow considered injurious. Absent any allegation of "injury in fact" that would sustain their assertion of standing, we must consider the amended complaint as it stands and in light of the arguments put forth by plaintiffs in support of their claim to have adequately alleged their standing.

Plaintiffs urge two theories, one explicitly and one by implication, in support of their claim that amended Count I contains adequate allegations for them to have standing. Clearly, plaintiffs place their greatest reliance and emphasis upon their argument that, as competitors of the defendants, they need not allege any specific "injury in fact" in order to establish their standing. Specifically, plaintiffs contend that they need not allege any economic "injury in fact" because the Wisconsin legislature has already established the requisite "injury in fact" as a matter of legislative policy. Since, plaintiffs argue, the Wisconsin branch banking statute's prohibitions were designed to operate independent of any showing of competitive injury, they contend that we must accept the legislative perception of injury as adequate to satisfy the "injury in fact" requirement entitling them to sue.

We find plaintiffs' theory unpersuasive. In order to satisfy Article III of the Constitution, a plaintiff "must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91, 99 (1979). Under no circumstances "may Congress abrogate the Article III minima: A plaintiff must always have suffered a 'distinct and palpable injury to himself.' " 441 U.S. at 100. Of course, it is also true that "the actual or threatened injury required by Article III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Warth v. Seldin,* 422 U.S. 490, 500 (1075); *Linda R.S. v. Richard D.,* 410 U.S. 614, 617 n.3(1973). It is obvious that this is not such a case.

Contrary to plaintiffs' argument, nothing in the Wisconsin statute permitting branch banking under limited circumstances or in the judicial decisions and attorney general's opinions construing that statute indicates that Wisconsin law confers an explicit right upon banks, without any showing of economic injury, to be free from the competition of another bank's branch. As stated in *State Bank of Drummond v. Nuesse,* 13 Wis. 2d 74, 82, 108 N.W. 2d 283, 287 (1961), the purpose of the Wisconsin branching law was only incidentally designed to protect banks as competitors: rather,

> [i]n exercising its authority the legislature intended to prevent the hazards of monopoly due to excessive numbers of branch banks and this was manifestly within the broad range of legislative discretion.... The legislature had a right to believe that a continuance of further branch banks would subject the state to an intolerable situation.... The state's economy is entitled and must be protected fully from the threats of undue concentration and monopoly in banking, and the legislature enacted ch. 101, Laws of 1947,for that very purpose.

Similarly, in 51 Op. Atty. Gen. 145, 150 (Wis. 1962), it was stated that:

> The branch banking statute has been said to have a

> threefold purpose. First as a restraint against concentration of the banking business in a few large banking corporations, second, as an aid to proper administration by insuring that centralized records are available and that responsible officers of the bank are close at hand to act in banking transactions in the interests of the bank and its depositors, and third, to aid regulatory officials in their tasks of supervision, examination and investigation. (citations omitted).

Nothing in these opinions or any other decision we have reviewed indicates that by enacting the branch banking law the Wisconsin legislature meant to confer a private right upon individual banks to be free from an unlawful branch absent any competitive injury.

Plaintiffs mistake our conclusion that they are without standing, absent an allegation of competitive injury, as a refusal on our part to recognize the policy decision of the Wisconsin legislature. Nothing could be farther from the truth. We have no quarrel with the policy embodied in Wis. Stat. §221.04(l)(j), nor do we have any doubt that plaintiffs, if they could make the requisite allegations of "injury in fact," could be proper parties plaintiff to enforce these policies. We merely hold that, absent such an allegation of "injury in fact," nothing in Wis. Stat. §221.04(l)(j) permits us to abrogate the requirements of Article III.

Plaintiffs' reliance upon *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1 (1968), is unjustified. In *Hardin*, the Supreme Court held that where, in enacting a statute limiting the areas into which the TVA could expand its service, Congress had been expressly concerned with protecting the competitive areas of certain private utilities, "the *injured* competitor has standing to require compliance" with the underlying statute. 390 U.S. at 6 (emphasis added). *Hardin* is distinguishable from this case on two crucial grounds. First, the statute in *Hardin* was explicitly drafted to protect competitors, and not merely some broader societal objective. Second, the Court in *Hardin* apparently assumed that the plaintiff had, in fact, been economically injured or threatened with economic injury by the proposed TVA expansion.

Any doubt with respect to the foregoing analysis of the purposes of Wis. Stat.§221.04(l)(j) has been removed by the recent decision of the Wisconsin Supreme Court in *State ex rel. First National Bank of Wisconsin Rapids v. M&I Peoples Bank of Coloma*, 95 Wis. 2d 303, 290 N.W. 2d 321 (1980). In that case, the court considered the appeal of the Farmers and Merchants Bank of Rudolph, Wisconsin (Farmers) from a trial court order which had held that Farmers lacked standing to pursue its action either in quo warranto or for a declaratory judgment with respect to Farmers' claims that the M&I Peoples Bank of Coloma, Wisconsin had unlawfully been given permission to establish a branch bank in Rome, Wisconsin. Reversing the trial court's determination that Farmers had failed to demonstrate economic "injury in fact," the Supreme Court's opinion nonetheless conclusively demonstrates that a concrete injury in fact is a *sine qua non* for standing by a "competitor" bank. 95 Wis. 2d at 308-9, 290 N.W. 2d at 325-26. Moreover, the Supreme Court construed the Wisconsin branch banking statute vis-a-vis the issue of whether it was drafted to protect competitors:

> The Supreme Court has "repeatedly held that the economic injury which results from lawful competition cannot, *in and of itself*, confer standing on the injured business to question the legality of any aspect of its competitor's operations." *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 5-6 (1968) (emphasis added). Thus, without more, a plaintiff lacks standing to sue to enjoin the ultra vires acts of a competitor. *See, e.g., Railroad Co. v. Ellerman*, 105 U.S. 166, 173-74 (1882). However, standing will be upheld when a statute indicates an intent to protect a competitive interest. In such cases, the injured competitor has standing to seek to require compliance with the sta-

> tute. *Hardin v. Kentucky Utilities Co., supra*, 390 U.S. at 6-7. Such is not the case here; *the requirement of sec. 221.04(l)(j)1, Stats., that a branch be no more than 25 miles from the home bank (if in a contiguous county), does not evince an intent to protect competitors.*

95 Wis. 2d at 311, 290 N.W. 2d at 327 (emphasis added). While this case involves §221.04(l)(j)2, rather than §221.04(l)(j)1, we cannot believe the result would here be any different. We, therefore, reiterate our conclusion in the September 16, 1978 opinion that plaintiffs' mere allegations of status as "competitors," standing alone, are not adequate to justify a conclusion that they have standing with respect to Count I.

Plaintiffs' second theory in support of their standing to bring Count I based on the current allegations of the amended complaint is implicit in the brief of plaintiffs Marine National Exchange Bank and the Marine Corporation in opposition to defendants' motions. While this brief ostensibly argues that plaintiffs have standing merely because of their competitor status, much of their argument centers upon certain statements made by the defendants at the time of the acquisition of Midland's assets to the effect that First Bank's acquisition would increase competition.

While an allegation that a plaintiff is suffering some threatened economic injury is sufficient to satisfy Article III standing requirements, *Gladstone, Realtors v. Village of Bellwood, supra*, 441 U.S. at 99; *National State Bank of Elizabeth, New Jersey v. Smith*, 591 F.2d 223, 229 (3rd Cir. 1979), we cannot conclude that these vague references to an unidentified threatened economic injury as of July 1977 will sustain a complaint filed in September 1978. Accordingly, to the extent plaintiffs implicitly contend that they have standing with respect to Count I by virtue of a threatened economic injury, we find the allegations of the complaint insufficient.

For these reasons, and for the further reasons stated in our opinion of September 16, 1978, defendants' motions to dismiss Count I for lack of standing are granted.

COUNT II

In Count II, plaintiffs allege that defendant Heimann's acts violated Wis. Stat. §221.04(l)(j)2, making the Midland transaction illegal even if he were correct in his assessment that Midland was failing. Further, plaintiffs allege that one or more of them might have acquired Midland had they been given a fair opportunity to do so. In their motions to dismiss, defendants renew their contention that plaintiffs' allegations do not state a claim upon which relief can be granted.

Federal banking law incorporates state restrictions upon branch banking. 12 U.S.C §36(c) provides that national banks may establish branches only in those states in which the state law permits state banks to establish branches and "subject to the restrictions as to location imposed by the law of the State on State banks." This provision of the law was enacted as a part of the McFadden Act, which had for its purpose the fostering and preservation of competitive equality between state and national banks.

The statute law of the state of Wisconsin permits branch banking by state banks subject to the restrictions upon location set out in Wis. Stat. §221.04(l)(j). In subdivision 2 of that section, the statute law provides for a lifting of the restrictions upon location in emergency situations where the state banking commissioner has made the three findings that a bank is failing; that it must be merged or consolidated for the protection of its depositors; and that the opportunity to merge or consolidate with the failing bank has been offered to and not accepted by all the other banks "within the geographical limits of subd. 1."

Since Wisconsin law would permit a state bank to merge with a failing bank and retain the merged bank as a branch under the circumstances spelled out in subdivision 2, there can be no claim of competitive inequality if, under the same circumstances, a national bank is permitted to merge with a failing bank and to retain it as a branch. The only question is whether national banks are subject to the statutory requirement that the commissioner (or Comptroller) must first have made the three findings set forth above. Defendants maintain that, for various reasons, the requirement of offering the failing bank to "all other banks within the geographical limits" is not binding upon the Comptroller or, that if it is, it has been complied with in this case. Plaintiffs contend that the requirement carries over to national banks under 12 U.S.C.§36 and that, on a motion to dismiss, the court cannot consider the Comptroller's showing that he complied with the requirement.

In our opinion of September 16, 1978, we held that this requirement of the state law conflicted with the federal banking laws designed to give the Comptroller the ability to move quickly to save failing banks. We there held:

> If the Wisconsin statute is interpreted as requiring the Comptroller to offer all of the banks in the area an opportunity to merge or consolidate with a failing bank before he may approve an arrangement making a failing bank or branch of a bank outside the geographical limits, the state statute would conflict with the federal banking laws governing failing banks which are designed to give the Comptroller the ability to move quickly to save failing banks. Under the supremacy clause, the state statute would be of no effect. *Easton v. Iowa*, 188 U.S. 220(1903); *Davis v. Elmira Savings Bank*, 161 U.S. 275 (1896). More likely, as the defendant bank and holding company suggest, the procedural provisions in subdivision 2 of Wis. Stats. §221.04(j) would be held not to be "restrictions as to locations" and therefore, not binding upon the Comptroller under 12 U.S.C. §36(c). In either event, the statute cannot be held to confer a right upon the plaintiff banks, the violation of which gives them

standing to sue in a federal court.

Plaintiffs' filing of Count II of the amended complaint essentially seeks reconsideration of this previous ruling. We continue, however, to believe that it would unduly hamper the Comptroller in dealing with emergency situations to require him to offer acquisition of a failing national bank to all banks within the "geographical area," regardless of their ability to accept such an offer. In our opinion, the Wisconsin statute incorporates restrictions upon the location of branch banks, which can be waived in emergency situations upon a finding by the banking supervisor that a bank is failing and that its depositors can be protected by merger and operation of the failing bank as a branch of its acquirer, but that the procedural requirement of offering the failing bank to all banks in its geographical area is not a "restriction upon location" which is binding upon the Comptroller.

If this provision is not binding upon the Comptroller, it follows that standing does not inure to those banks to whom the acquisition opportunity was not offered. Also, it follows that those banks have no cognizable claim against the Comptroller. We conclude, therefore, that the plaintiffs do not have standing to assert the claim raised in Count II and that their allegations do not state a claim upon which relief can be granted.

ORDER

IT IS ORDERED that defendants' motions to dismiss the amended complaint are GRANTED with respect to Counts I and II of plaintiffs' amended complaint.

Entered this 30th day of June, 1980.

BY THE COURT:

HUBERT L. WILL,
Senior District Judge

APPENDIX C

JUDGMENT & ORDERS OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

June 12, 1981

Before

Hon. LUTHER M. SWYGERT, Circuit Judge

Hon. ROBERT A. SPRECHER, Circuit Judge

Hon. WALTER E. HOFFMAN, Senior District Judge*

Marshall & Ilsley Corporation, M&I Marshall & Ilsley Bank, the Marine Corporation, Marine National Exchange Bank of Milwaukee, Heritage Wisconsin Corporation, and Heritage Bank Milwaukee,
Plaintiffs-Appellants,

vs.

John G. Heimann, Comptroller of the Currency of the United States, First Bank (N.A.) and First Bank System, Inc.,
Defendants-Appellees.

Appeal from the United States District Court from the Western District of Wisconsin

No. 78-C-42
Judge Hubert L. Will

This cause was heard on the record from the United States District Court for the Western District of Wisconsin, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

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*The Honorable Walter E. Hoffman, Senior District Judge for the Eastern District of Virginia is sitting by designation.

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

June 26, 1981

Before

Hon. ROBERT A. SPRECHER, Circuit Judge

Marshall & Ilsley Corporation, et al.,
Plaintiffs-Appellants,

vs.

John G. Heimann, Comptroller of the Currency of the United States, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Wisconsin

No. 78-C-42
Judge Hubert L. Will

This matter comes before the Court for its consideration upon the "MOTION FOR EXTENSION OF TIME IN WHICH PLAINTIFFS-APPELLANTS MAY FILE A PETITION FOR REHEARING *(IN BANC)*" filed herein on June 24, 1981, by counsel for the plaintiffs-appellants. Treating this motion as a motion to file plaintiffs-appellants' petition for rehearing and suggestion for rehearing *in banc* instanter,

IT IS ORDERED that said motion is hereby GRANTED, and the Clerk of the Court is directed to file instanter herein the 25 tendered copies of plaintiffs-appellants' petition for rehearing and suggestion for rehearing in *in banc.*

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604
August 26, 1981
Before

Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. WALTER E. HOFFMAN, Senior District Judge*

Marshall & Ilsley Corporation, et al.,
Plaintiffs-Appellants,

vs.

John G. Heimann, Comptroller of the Currency of the United States, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Wisconsin.

No. 78-C-42
Judge Hubert L. Will

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by plaintiffs-appellants, no judge in active service has requested a vote thereon,** and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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*Honorable Walter E. Hoffman, Senior District Judge for the Eastern District of Virginia is sitting by designation.

**Judge Cudahy disqualified himself from participating in consideration of the petition for rehearing *in banc.*

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APPENDIX D

ORIGINAL AND AMENDED COMPLAINTS OF PETITIONERS AS FILED IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

In the United States District Court
For Western District of Wisconsin

Marshall & Ilsley Corporation,
M&I Marshall & Ilsley Bank,
The Marine Corporation,
Marine National Exchange Bank of Milwaukee,
Inland Heritage Corporation,
and Heritage Bank of Milwaukee,
Plaintiffs

-vs-

Complaint for Declaratory Judgment and Injunctive Relief

John G. Heimann, Controller of the Currency of the United States
First Bank (N.A.), and
First Bank System, Inc.,
Defendants

Case No. 78-C-42

Plaintiffs, by their attorneys, allege:

JURISDICTION

1. This action arises under the National Bank Act, specifically 12 U.S.C. §§36, 81 and 181, the Bank Merger Act, specifically 12 U.S.C. §1828(c), the Bank Holding

Company Act, specifically 12 U.S.C. §1842, and the Administrative Procedure Act, specifically 5 U.S.C. §§551, 558 and 702.

2. The matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs.

3. Jurisdiction is vested in this court by 28 U.S.C §§1331, 1346 (a)(2), and 2201-2202, and by 5 U.S.C. §§701-706.

PARTIES

4. Plaintiff Marshall & Ilsley Corporation, a Wisconsin corporation, having its principal office at 770 North Water Street, Milwaukee, Wisconsin 53202, is a bank holding company serving the State of Wisconsin through nineteen banks and other subsidiaries engaged in investment management, equipment leasing, mortgage banking and insurance.

5. Plaintiff M&I Marshall & Ilsley Bank is a Wisconsin banking corporation having its principal office and place of business at 770 North Water Street, Milwaukee, Wisconsin 53202.

6. Plaintiff the Marine Corporation, a Wisconsin corporation having its principal office at 111 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, is a bank holding company serving the State of Wisconsin through seventeen banks and other subsidiaries engaged in investment advisory services, servicing of equipment leasing operations of its subsidiary banks, servicing the credit card business of its subsidiary banks and owning and managing the building in which the plaintiff's principal offices and the offices of its largest banking subsidiary are located.

7. Plaintiff Marine National Exchange Bank of Milwaukee is a national banking association having its principal office and place of business at 111 East Wisconsin Avenue, Milwaukee, Wisconsin 53202.

8. Plaintiff Inland Heritage Corporation, a Wisconsin corporation having its principal office at 2323 North

Mayfair Road, Milwaukee, Wisconsin 53226, is a bank holding company serving Southeastern Wisconsin through six commercial banks, a trust company and other subsidiaries engaged in investment counseling, equipment leasing, the sale of credit-related insurance and the furnishing of administrative and data processing services.

9. Plaintiff Heritage Bank of Milwaukee is a Wisconsin banking corporation having its principal office and place of business at 435 East Mason Street, Milwaukee, Wisconsin 53202.

10. Defendant John G. Heimann is the Comptroller of the Currency of the United States (hereinafter referred to as the "Comptroller"), an office created by the 12 U.S.C. 2, and is charged by law with administrative and regulatory authority over national banks.

11. Defendant First Bank (N.A.) (hereinafter referred to as LaCrosse) is a national banking association established in the City of LaCrosse, Wisconsin, with its principal office at 319 Main Street, LaCrosse, Wisconsin, within the Western Judicial District of the State of Wisconsin. Prior to July 23, 1977, the name of LaCrosse was The National Bank of Wisconsin in LaCrosse. LaCrosse is a subsidiary of First Bank System, Inc.

11a. Defendant First Bank System, Inc. (hereinafter referred to as First Bank System), a Delaware corporation, is a bank holding company with its principal office in Minneapolis, Minnesota. During 1976 it controlled 86 banks in five states with total deposits in excess of $6 billion.

FIRST CLAIM

12. Effective July 23, 1977, LaCrosse acquired substantially all the assets and assumed substantially all the liabilities of Midland National Bank (hereinafter referred to as Midland), a national banking association having its principal office at 201 West Wisconsin Avenue in the City of Milwaukee, Wisconsin (hereinafter referred to as the Milwaukee Office).

13. In connection with such acquisition of assets and assumption of liabilities, LaCrosse paid to Midland a purchase price of $12,994,005.

14. Under the agreement for the acquisition of Midland by LaCrosse, the acquisition was expressly conditioned upon the approval of the Comptroller for establishment of the Milwaukee Office of Midland as a branch of LaCrosse.

15. Both LaCrosse and Midland were at all times relevant hereto insured by the Federal Deposit Insurance Corporation and each was an "insured bank" within the meaning of 12 U.S.C. §1828(c), such that the acquisition of Midland by LaCrosse required the approval of the Comptroller.

16. By a decision dated July 23, 1977 (hereinafter referred to as the Decision), the Comptroller approved the application of LaCrosse to purchase the assets and assume the liabilities of Midland, and in so doing the Comptroller waived the approval of the transaction by the shareholders of Midland pursuant to 12 U.S.C. §181 and waived certain other procedures and requirements pursuant to the Bank Merger Act, 12 U.S.C. §1828(c). A copy of the Decision is annexed hereto and incorporated herein as Exhibit A.

17. Upon information and belief, the Decision was based upon the facts, opinions and conclusions set forth in the affidavit of Robert Bloom, First Deputy Comptroller of the Curency (hereinafter referred to as the Affidavit) a copy of which is annexed hereto and incorporated herein as Exhibit B.

18. From and after the acquisition of Midland by LaCrosse, LaCrosse has operated the Milwaukee Office as a branch bank.

19. Pursuant to 12 U.S.C. §81, LaCrosse, as a national banking association, may transact its general business only in LaCrosse, Wisconsin, and in the branch or branches, if any, established or maintained by it in accordance with the provisions of 12 U.S.C. §36.

20. Pursuant to 12 U.S.C. §36, the establishment of a branch bank by LaCrosse requires the approval of the Comptroller and LaCrosse was permitted to establish and operate a new branch at the Milwaukee Office only if such establishment and operation were at the time authorized to state banks by the statute law of the State of Wisconsin by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State of Wisconsin on state banks. Such requirements and restrictions of 12 U.S.C. §36 are based upon the national policy of competitive equality between national banks and state banks with respect to the establishment and operation of branch banks.

21. Under the statute law of the State of Wisconsin, specifically §221.04(1)(f), Wisconsin Statutes, a state bank located in LaCrosse is prohibited from establishing and operating a branch bank in Milwaukee unless the establishment and operation of such a branch meets the requirements of §221.04 (1)(j)2. of the Wisconsin Statutes (hereinafter referred to as the Wisconsin Emergency Branch Bank Statute) which provides as follows:

> "2. The limits set forth in subd. 1 may not apply to any emergency situation where the commissioner finds that a bank is failing and that it must be merged or consolidated with another bank and operated as a branch bank for the protection of the depositors of the failing bank and that the opportunity to merge or consolidate with the bank has been offered to and not accepted by all other banks within the geographical limits of subd. 1."

22. Upon information and belief, the terms and conditions of the acquisition of Midland by LaCrosse, the purchase price for Midland paid by LaCrosse, the public statements made by the participants to the transaction and the other facts and circumstances of the transaction are inconsistent with any conclusion that Midland

was "failing" or that Midland "must be merged or consolidated with another bank and operated as a branch bank for the protection of the depositors of the failing bank" within the meaning of the Wisconsin Emergency Branch Bank Statute.

23. Upon information and belief, the Wisconsin Commissioner of Banking did not at any time make the findings specified in the Wisconsin Emergency Branch Bank Statute with respect to the condition of Midland or the acquisition of Midland by LaCrosse.

24. The opportunity to acquire, merge or consolidate with Midland was not offered to Plaintiffs Marine National Exchange Bank of Milwaukee or Heritage Bank of Milwaukee, and upon information and belief, such opportunity was not offered to any other bank within the geographical limit as required by the Wisconsin Emergency Branch Bank Statute except the M&I Marshall & Ilsley Bank.

25. The opportunity to merge or consolidate with Midland was not offered to the plaintiff M&I Marshall & Ilsley Bank prior to approximately 2:00 P.M. July 22, 1977. At such time, representatives of the Comptroller met with representatives of such plaintiff bank and advised them that they could consider acquisition of Midland but that their decision would have to be made by noon on Sunday, July 24, 1977, and that even if they sought such an acquisition, the necessary approval by the appropriate regulatory authorities could be denied.

26. The time permitted by the Comptroller for the plaintiff M&I Marshall & Ilsley Bank to consider the acquisition of Midland was arbitrary and unreasonable and made it impossible for such plaintiff to give any meaningful consideration to such possibility. Upon information and belief, the time permitted LaCrosse and First Bank System to consider the acquisition of Midland extended over a period of many months.

27. The Decision (Exhibit A), the Affidavit (Exhibit B), and the actions of the Comptroller reflect the arbitrary and unilateral decision of the Comptroller that no

bank in the Milwaukee area could properly be considered a prospective purchaser of Midland and the willful disregard by the Comptroller of the clear and unambiguous requirements of the Wisconsin Emergency Branch Bank Statute.

28. The establishment and operation of a branch bank by LaCrosse at the Milwaukee Office, and the approval thereof by the Comptroller, are in violation of 12 U.S.C. §36 and Wisconsin Statutes, §§221.04(1) (f) and (j), and the Decision of the Comptroller permitting the establishment and operation of such branch bank is arbitrary, capricious, an abuse of discretion, not in accordance with law, in excess of the statutory jurisdiction and authority of the Comptroller, without the observance of the procedure required by law and unwarranted by the facts.

29. There are no administrative remedies available to the plaintiffs and plaintiffs have exhausted all available administrative remedies.

30. An actual controversy exists between the parties to this action as to which plaintiffs have no adequate or effective remedy other than the relief sought herein.

31. Plaintiffs are directly interested, have suffered and are suffering a legal wrong, and are adversely affected and aggrieved by the aforesaid violations of law in that LaCrosse and First Bank System have been permitted to acquire Midland and establish and operate a branch bank at the Milwaukee Office while at the same time plaintiffs were not permitted to acquire Midland or to establish such a branch bank.

32. The Comptroller's action in approving this transaction and unlawfully exempting this transaction from applicable legal requirements has created a double standard under which special rights and privileges have been granted to LaCrosse and First Bank System by administrative action, which rights and privileges were and are contrary to law, thus causing substantial, immediate and irreparable injury to plaintiffs.

SECOND CLAIM

33. Paragraphs 1. through 32. above are hereby incorporated herein as if fully set forth.

34. As of December 31, 1976, LaCrosse had total deposits of approximately $54,400,000.

35. As of December 31, 1976, Midland had total deposits of approximately $337,300,000 and ranked as the fourth largest commercial banking institution headquartered in Wisconsin. As of June 30, 1977, Midland had total assets of approximately $403,000,000. As of July 23, 1977, Midland had significant problems with respect to its loans and capital as more fully described in the Decision (Exhibit A) and the Affidavit (Exhibit B).

36. In view of the relative size of LaCrosse and Midland and the problems then faced by Midland, LaCrosse, as an independent entity and without assistance of First Bank System, could not as a practical matter have acquired Midland or provided the additional capital which the Comptroller had required Midland to obtain.

37. Pursuant to the requirements of 12 U.S.C. §1828(c)(5) in considering the proposed acquisition of Midland by LaCrosse the Comptroller was required to consider "the financial and managerial resources and future prospects of the existing and proposed institutions."

38. As reflected in the Decision (Exhibit A) and the Affidavit (Exhibit B) the Comptroller arbitrarily and unilaterally determined that no Milwaukee bank could properly be considered a prospective purchaser of Midland, notwithstanding that there were a number of Milwaukee banks and holding companies, including the plaintiffs, with resources vastly exceeding those of LaCrosse considered as an independent entity and without regard to First Bank System.

39. As of December 31, 1976, First Bank System had total assets in excess of $7,000,000,000 and as of June 30,

1977, First Bank System had total assets in excess of $7,900,000,000. As of July 23, 1977, First Bank System controlled a variety of financial and business enterprises, including approximately ninety banks and trust companies.

40. In connection with the acquisition of Midland, First Bank System unconditionally guaranteed the performance of all obligations of LaCrosse under the purchase agreement with Midland, First Bank System provided $10,000,000 of additional capital to LaCrosse by purchasing additional common stock of LaCrosse, LaCrosse changed its name as described in paragraph 7. above to reflect its affiliation with First Bank System and the parties engaged in an extensive public advertising campaign describing the transaction as Midland becoming "part of First Bank System."

41. Although the transaction between LaCrosse and Midland was cast in the form of an acquisition of assets and assumption of liabilities of Midland by LaCrosse, First Bank System provided the necessary financial backing for the transaction and such acquisition was in substance and in practical effect an acquisition of Midland by First Bank System.

42. Upon information and belief, the purported acquisition of Midland by LaCrosse was approved by the Comptroller only because the acquisition was the legal and practical equivalent of an acquisition by First Bank System.

43. First Bank System is a bank holding company within the meaning of 12 U.S.C. §1842.

44. Pursuant to 12 U.S.C. §1842 the acquisition of Midland by First Bank System would have required the approval of the Board of Governors of the Federal Reserve System.

45. Neither First Bank System nor La Crosse sought or obtained the approval of the Board of Governors of the Federal Reserve System for the acquisition of Midland.

46. The state in which the total deposits of all banking subsidiaries of First Bank System are the largest is the State of Minnesota.

47. Pursuant to 12 U.S.C. §1842(d), First Bank System could have obtained the approval of the Board of Governors of the Federal Reserve System for the acquisition of a bank outside the State of Minnesota only if such acquisition was specifically authorized by the statute laws of the state in which such bank was located.

48. The statute laws of the State of Wisconsin, the state in which Midland was located, do not permit the acquisition of banks located in Wisconsin by bank holding companies located outside the State of Wisconsin.

49. Upon information and belief, the purported acquisition of Midland by LaCrosse was an attempt to evade the prohibitions of 12 U.S.C. §1842(d) which would have prevented the direct acquisition of Midland by First Bank System.

50. The acquisition of Midland by LaCrosse was in substance and effect an acquisition of Midland by First Bank System without compliance with 12 U.S.C §1842(a) and in contravention of 12 U.S.C. §1842(d) and the approval of such acquisition by the Comptroller was arbitrary, capricious, an abuse of discretion, not in accordance with law, in excess of the statutory jurisdiction and authority of the Comptroller, without observance of the procedure required by law and unwarranted by the facts.

WHEREFORE, plaintiffs pray:

1. That the court issue a declaratory judgment that the establishment and operation of a branch bank by LaCrosse in the City of Milwaukee, and the approval thereof by the Comptroller, was and is contrary to law.

2. That the court issue a declaratory judgment that the acquisition of Midland by LaCrosse and First Bank System and the approval thereof by the Comptroller, was contrary to law.

3. That LaCrosse be ordered to cease operation of a branch bank in the City of Milwaukee.

4. That LaCrosse be ordered to divest itself of the banking assets and operations acquired from Midland by transferring the same, in accordance with all legal requirements, to a person or persons other than First Bank System or any of its subsidiaries or affiliates.

5. That the court award to the plaintiffs their costs, disbursements and attorney's fees and grant such other and further relief as it deems appropriate.

Marshall & Ilsley Corporation, M&I Marshall & Ilsley Bank, The Marine Corporation, Marine National Exchange Bank of Milwaukee, Inland Heritage Corporation and Heritage Bank of Milwaukee

By /S/ James Urdan
James Urdan

/S/ Robert P. Harland
Robert P. Harland

/S/ Eckard von Estorff
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EXHIBIT A

DECISION OF THE COMPTROLLER OF THE CURRENCY ON THE APPLICATION OF THE NATIONAL BANK OF WISCONSIN IN LA CROSSE, LA CROSSE, WISCONSIN, TO PURCHASE THE ASSETS AND ASSUME THE LIABILITIES OF MIDLAND NATIONAL BANK, MILWAUKEE, WISCONSIN

STATEMENT

The Comptroller of the Currency has been requested to approve a transaction whereby The National Bank of Wisconsin in La Crosse, La Crosse, Wisconsin ("Purchasing Bank"), will purchase the assets and assume the liabilities of Midland National Bank, Milwaukee, Wisconsin ("Selling Bank", or "MNB". In addition, the Purchasing Bank will change its corporate title to "First Bank, (N.A.)", will exercise fiduciary powers and will assume the trust assets of Selling Bank. The subject application rests upon an agreement executed between the proponent banks which is incorporated herein by reference the same as if fully set forth.

MNB was organized as a National bank on May 5, 1965, when it was granted Charter No. 15510. As of year-end 1976, the Selling Bank had total deposits of $337.3 million, and ranked as the fourth largest commercial banking institution headquartered within the State of Wisconsin. MNB does not operate any branch offices in addition to its main office in Milwaukee, but the bank presently operates two CBCT's, one in Milwaukee, and one in Whitefish Bay. (MNB has received approval from this Office to operate one other CBCT in Milwaukee, that, to date, is not in operation. Purchasing Bank also requested permission to operate this CBCT unit.)

Purchasing Bank, at December 31, 1976, had total commercial bank deposits of $54.4 million; however, it is wholly owned banking subsidiary of First Bank System, Inc., Minneapolis, Minnesota, a registered multibank holding company that controls 86 banks, with total deposits exceeding $6 billion.

Serious asset problems became critical in MNB during 1976, resulting in a substantial net operating loss for the year. Most of the losses were attributable to the real estate loan portfolio. The severity and complexity of the real estate loan problems, as well as the volatility of the bank's deposit structure, threatened the MNB's survival without a massive injection of capital. During the early months of 1977, efforts by bank management to secure needed capital were unsuccessful. At the same time close monitoring of the bank by the Comptroller's Office indicated that its condition was continuing to deteriorate.

An offer has been made to MNB contemplating the saleof its assets and the assumption of its liabilities, including all deposit liabilities, by The National Bank of Wisconsin in LaCrosse. Because of the pecarious financial condition of MNB and the liklihood that a failure immediately to consummate this proposed transaction will result in the probable failure of this Milwaukee institution, with all of the attendant injury to depositors, creditors, and shareholders, the Comptroller has considered this proposed transaction under the emergency provisions of 12 USC §§181 and 1828(c)(6). Title 12 USC §181 was designed to permit a troubled national bank such as MNB, heading for a possible insolvency and in the midst of an emergency, to move swiftly through its Board of Directors, to sell its assets to another bank which will also assume its deposit liabilities. The requirement as shareholder approval of such an offer or agreement may be specifically waived by the Comptroller if an emergency is found to exist. The Comptroller is not required to wait until a bank is insolvent, but may make such a determination when the facts demonstrate a combination of circumstances less than insolvency sufficiently serious to require swift action to consummate the sale.

After consideration of the competitive environment within the Milwaukee area, existing concentration of deposits among the larger banks in the community, and the extraordinary financial and managerial resources which will be necessary to sustain the operations of MNB, the Comptroller has determined that the proposed acquisition and the retention of the existing office of Selling Bank as a branch of the Purchasing Bank is consistent with the emergency branching statute of the State of Wisconsin (General Banking Law, §221.04 (1)(j)) and 12 USC §36(c). In particular, the Comptroller has concluded that no bank in the Milwaukee area can properly be considered a prospective purchaser in these circumstances.

Accordingly, the Comptroller finds that the proposed transaction will be in accord with all pertinent provisions of applicble Federal and Wisconsin statutes. The Purchasing Bank, backed by the strength of its parent holding company, should provide strong financial and managerial resources and insure uninterrupted banking services to all segments of the Milwaukee community. The anticompetitive effects of the proposed transaction, if any, are deemed to be *de minimis*.

For the foregoing reasons, the Purchasing Bank's application to purchase the assets and to assume the liabilities of MNB as set forth in their agreement is approved; pursuant to 12 USC §181 MNB shareholder approval of the transaction is waived.Pursuant to 12 USC 1828(c)(6), the Comptroller further finds that probable failure of MNB requires him to act immediately. The Comptroller thus waives publication of notice, dispenses with solicitation of competitive reports from other agencies, and authorizes the transaction to be consummated immediately.

The Comptroller also hereby approves the three CBCT branches of MNB as CBCT branches of Purchasing Bank; the change in corporate title of Purchasing Bank to "First Bank, (N.A.)"; the exercise of fiduciary

powers by Purchasing Bank and the assumption of the trust assets of MNB by Purchasing Bank.

John G. Heimann
Comptroller of the Currency

July 23, 1977

EXHIBIT B

IN THE MATTER OF
MIDLAND NATIONAL BANK
MILWAUKEE, WISCONSIN

City of Washington)
)ss:
District of Columbia)

AFFIDAVIT

Robert Bloom, being duly sworn, deposes and says:

1. I am the First Deputy Comptroller of the Currency, having held this position since July 20, 1975. From August 1, 1976, through July 11, 1977, I also served as the Acting Comptroller of the Currency.

2. I make this affidavit on the basis of personal knowledge and the offical records of the Office of the Comptroller of the Currency.

3. The Office of the Comptroller of the Currency was established in 1863 and is a bureau of the United States Department of the Treasury. The Comptroller supervises the national banking system and is charged with the responsibility for executing laws relating to the national banking system (12 U.S.C. §§1 and 2). There are more than 4,700 national banks located throughout the United States. The Comptroller's Office is required to examine each of these banks three times in every two years (12 U.S.C. §481). To perform this task, the Comptroller's Office employs approximately 2,000 persons as national bank examiners or assistant national bank examiners. The Comptroller also approves or disapproves the chartering of new national banks (12 U.S.C. §27), applications by existing national banks to establish branches or to relocate banking offices (12 U.S.C. §§30 and 36), applications to merge or consolidate banks when the surviving bank is a national bank (12 U.S.C. §§214, 214a, and 1828(c)), and changes in the capital

structure of a national bank (12 U.S.C. §§57 and 58; 12 C.F.R. Part 14). The Comptroller also determines when a national bank is in danger of probable failure or when an emergency exists and is authorized, under such circumstances, to waive shareholder approval of any purchase and assumption of the assets and liabilities of a national bank (12 U.S.C. §181).

4. As of December 31, 1976, the annual report of the Midland National Bank, Milwaukee, Wisconsin, showed total resources and deposits of $394,648,314 and $337,313,520, respectively. The bank was the fourth largest banking institution in the State of Wisconsin, and maintained its only office at 201 W. Wisconsin Avenue, Milwaukee.

5. Three regular examinations of Midland were conducted by national bank examiners between September 1975 and January 1977. These examinations disclosed that Midland had serious and mounting financial problems, especially in the real estate sector.

6. From the fall of 1975 through the spring of 1977, Midland suffered a severe and continuing deterioration of its asset structure, principally because of real estate loan problems. Total classified assets at the conclusion of the examination in November 1975 totaled $35.6 million, which figure represented 129.3 percent of gross capital funds. At the examination concluded in March 1976, assets subject to classification had increased to $51.4 million, and were equivalent to 171.4 percent of gross capital funds. At the examination concluded in January 1977, classified assets had increased to $82.1 million, the equivalent of 267.9 percent of gross capital funds.

7. Between the examinations concluded in March 1976 and January 1977, assets classified as losses increased from $342 thousand to $5.2 million. Assets classified as of doubtful collectability increased by more than $11 million, from $3.2 million to $14.9 million. Criticized assets totaled $97.7 million or 319 percent of gross capital funds. As discussed in greater detail be-

low, by the summer of 1977, it had become apparent that the bank's capital and reserves of approximately $26 million were inadequate to absorb the large potential losses inherent in these criticized assets.

8. Approximately 96 percent of the loan losses experienced by the bank in 1976 occurred in the real estate loan portfolio. Several of the remaining real estate credits, representing a preponderant portion of its criticized assets, were speculative in nature and required further funding beyond the financial capacity of the bank. The future of the credits, as bankable assets, was seriously in question.

9. The complexity of some of the large problem assets, and the attendant workout programs developed by management in an attempt to strengthen these assets, also resulted in genuine difficulty in conducting operations of the bank within the framework of the national banking laws. As noted, many of the loans, under arrangements structured by the bank, required extensive additional funding in order to effect meaningful recoveries; however, at the same time, statutory loan limits effectively precluded such funding by Midland.

10. These asset problems had a severe and continuing adverse impact upon the earning capacity of the bank. The bank reported a net operating loss for 1976 of $8,595,982 before application of income tax credits and securities gains. This resulted in a $2.80 loss per share. Inasmuch as the bank had paid taxes from income earned in prior years, the bank took advantage of a ten-year carryback feature allowed by the Internal Revenue Code, and claimed a $4,794,000 tax credit. Thus, the bank's net loss was $3,764,038. With this provision, however, the benefit of the available tax credit was, for all practical purposes, exhausted.

11. Because its loan portfolio included such a large proportion of problem assets, the bank also was restricted in its ability to sell or otherwise convert assets to cash to meet the ordinary demands of depositors and creditors. Thus, the bank was in no position to with-

stand a liquidity crisis without taking crippling losses brought on by selling assets at substantial discounts to their book value. The bank's intractable liquidity situation was worsened by the extreme volatility of its deposit structure. A year-end 1976, 48 percent of the bank's time deposits was centered in large certificates of deposit of $100,000 or more. Holders of these certificates of deposit and other short-term unsecured instruments included many entities of state and local governments as well as other local and regional investors. These investors participated in a money market which was extraordinarily sensitive to adverse financial trends and negative publicity about financial institutions.

12. Following several meetings between Washington staff personnel and executive officers of the bank, senior members of the Comptroller's Washington staff, the Regional Administrator, and the examiner-in-charge met with the board of directors at the bank on February 25, 1977, to review the results of the latest examination and to express concern for the survival of the institution. Stockholders' equity had declined during 1976 to $16,733,000, compared to $21,080,000 at year-end 1975. The severity and complexity of the bank's problems threatened further losses which would quickly exhaust available capital. This prospect, together with the bank's volatile deposit structure, threatened a failureof the bank unless additional capital could be quickly secured.

13. pursuant to a formal agreement with the Comptroller's office, the bank's board of directors formed a special executive committee to pursue all possible avenues of capital injection, to eliminate a number of statutory violations, and to implement accelerated programs for reducing criticized assets and concentrations of credit. The continued existence of the bank depended upon the early success of these programs.

14. Intensive monitoring of the condition of the bank and communications between members of the Comp-

troller's staff and the special executive committee of the bank during April, May and June 1977, confirmed that the bank would not be able to raise the capital on its own. The condition of the bank continued to deteriorate rapidly without reasonable prospect of reversal. In addition, the necessary efforts of the special executive committee to locate prospective sources of capital threatened to surface in adverse publicity which would almost certainly trigger a deposit run-off which the bank could not withstand. The Comptroller concluded that the bank's condition had become so precarious as to threaten its immediate survival as a solvent institution.

15. On July 20, 1977, the Comptroller's staff was advised that the National Bank of Wisconsin in La Crosse, La Crosse, Wisconsin, a subsidiary of First Bank System, Inc., Minneapolis, Minnesota, had reached a tentative understanding with Midland management to purchase the bank's assets and assume its liabilities, including all deposit liabilities. First Bank System, with 86 banks holding total deposits exceeding $6 billion, was considered by the Comptroller's staff to be capable of assuming the liabilities and absorbing and working out the problem assets of Midland. The only other realistic potential purchaser (First National Bank of La Crosse, La Crosse, Wisconsin, a subsidiary of Northwest Bancorp., Minneapolis, Minnesota) had earlier indicated to Midland management and members of th Comptroller's staff that it was not willing to consummate such a transaction.

16. After receipt of information concerning the First Bank System proposal, the Comptroller considered whether any other banking organization in the Milwaukee area or the State of Wisconsin could be considered a viable purchaser in the emergency. After reviewing all relevant facts, including the competitive environment and the extraordinary financial and managerial resources necessary to absorb the massive problem assets and assume the liabilities of Midland,

the Comptroller concluded that the contemplated purchase offered the only viable supervisory alternative to a probable failure of Midland.

17. Therefore, in view of the precarious financial condition of Midland and the likelihood that a failure immediately to consummate this proposed transaction would result in the probable failure of this Milwaukee institution with all of the attendent injury to depositors, creditors, and shareholders, the Comptroller considered the proposed transaction under the emergency provisions of 12 U.S.C. §§181 and 1828(c)(6). Title 12 U.S.C. §181 was designed to permit a troubled bank, such as Midland, heading for a possible insolvency and in the midst of an emergency, to move swiftly through its board of directors, to sell its assets to another banks which will also assume its deposit liabilities. The requirement of shareholder approval may be specifically waived by the Comptroller of the Currency if an emergency is found to exist. The Comptroller is not required to wait until a bank is insolvent but may make such a determination when the facts demonstrate a combination of circumstances less than insolvency sufficiently serious to require swift action to consummate the sale. In such circumstances the Comptroller is authorized by the Bank Merger Act, 12 U.S. C §1828(c), to act immediately, in his sole discretion, to approve an acquisition and to authorize the immediate consummation of the transaction.

18. Acting pursuant to these emergency procedures, therefore, the Comptroller waived shareholder approval and authorized immediate consummation of the transaction at 12:00 p.m., C.D.T., July 24, 1977.

19. The Comptroller was satisfied that, but for this purchase and assumption, Midland's condition would have further deteriorated with a significan likelihood of failure and the attendant loss to the depositors, other creditors and the shareholders of Midland. Because of this purchase and assumption, Midland depositors will continue their deposit relationship without disruption

in a strong viable bank and Midland creditors and stockholders will receive the benefit of an immediate sale of assets rather than having their interests by a long-term disposal of assets under a receivership.

Robert Bloom
First Deputy Comptroller
of the Currency

Subscribed and sworn to
before me this 21st day
of July, 1977.

Barbara A. Smith
Notary Public

In the United States District Court
For Western District of Wisconsin

Marshall & Ilsley Corporation,
M&I Marshall & Ilsley Bank,
The Marine Corporation,
Marine National Exchange Bank of Milwaukee,
and Heritage Bank of Milwaukee,
Plaintiffs

-vs-

Amended Complaint For Declaratory Judgment and Injunctive Relief

John G. Heimann, Controller of the Currency of the United States
First Bank (N.A.), and
First Bank System, Inc.,
Defendants

Case No. 78-C-42

Plaintiffs, by their attorneys, allege:

JURISDICTION

1. This action arises under the National Bank Act, specifically 12 U.S.C. §§36 and 81, the Bank Merger Act, specfically 12 U.S.C. §1828(c) and the Administrative Procedure Act, specifically 5 U.S.C. §§551, 558 and 702.

2. The matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs.

3. Jurisdiction is vested in this court by 28 U.S.C.§§1331, 1346(a)(2), and 2201-2202, and by 5 U.S.C. §§701-706.

PARTIES

4. Plaintiff Marshall & Ilsley Corporation, a Wisconsin corporation, having its principal office at 770 North Water Street, Milwaukee, Wisconsin 53202, is a bank holding company serving the State of Wisconsin through nineteen banks, including plaintiff M&I Marshall and Ilsley Bank, and other subsidiaries engaged in investment management, equipment leasing, mortgage banking and insurance.

5. Plaintiff M&I Marshall & Ilsley Bank is a Wisconsin banking corporation having its principal office and place of business at 770 North Water Street, Milwaukee, Wisconsin 53202.

6. Plaintiff the Marine Corporation, a Wisconsin corporation having its principal office at 111 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, is a bank holding company serving the State of Wisconsin through seventeen banks, including plaintiff Marine National Exchange Bank of Milwaukee, and other subsidiaries engaged in investment advisory services, servicing of equipment leasing operations of its subsidiary banks, servicing the credit card business of its subsidiary banks and owning and managing the building in which the plaintiff's principal offices and the offices of its largest banking subsidiary are located.

7. Plaintiff Marine National Exchange Bank of Milwaukee is a national banking association having its principal office and place of business at 111 East Wisconsin Avenue, Milwaukee, Wisconsin 53202.

8. Plaintiff Heritage Wisconsin Corporation, a Wisconsin corporation having its principal office at 2323 North Mayfair Road, Milwaukee, Wisconsin 53226, is a bank holding company serving Southeastern Wisconsin through six commercial banks, including plaintiff Heritage Bank Milwaukee, a trust company and other subsidiaries engaged in investment counseling, equipment leasing, the sale of credit-related insurance and the furnishing of administrative and data processing services.

9. Plaintiff Heritage Bank Milwaukee is a Wisconsin banking corporation having its principal office and place of business at 435 East Mason Street, Milwaukee, Wisconsin 53202.

10. Defendant John G. Heimann is the Comptroller of the Currency of the United States (hereinafter referred to as the "Comptroller"), an office created by the 12 U.S.C. §2 and is charged by law with administrative and regulatory authority over national banks.

11. Defendant First Bank (N.A.) (hereinafter referred to as First Bank) is a national banking association established in the City of LaCrosse, Wisconsin, with its principal office at 319 Main Street, LaCrosse, Wisconsin, within the Western Judicial District of the State of Wisconsin. Prior to July 23, 1977, the name of First Bank was the National Bank of Wisconsin in LaCrosse. First Bank is a subsidiary of First Bank System, Inc.

12. Defendant First Bank System, Inc. (hereinafter referred to as First Bank System), a Delaware corporation, is a bank holding company with its principal office in Minneapolis, Minnesota. During 1976 it controlled 86 banks in five states with total deposits in excess of $6 billion.

FIRST CLAIM

13. Immediately prior to July 23, 1977, Midland National Bank (hereinafter referred to as Midland) was a national banking association having its principal office at 201 West Wisconsin Avenue, Milwaukee, Wisconsin.

14. Immediately prior to June 23, 1977, the plaintiff banks and Midland were located within the same city and county and within a radius of one-half mile of each other. As of December 31, 1976, Midland had total deposits of approximately $337,300,000 and ranked as the fourth largest commercial banking institution headquartered in Wisconsin. As of June 30, 1977, Midland had total assets of approximately $403,000,000. Immediately prior to July 23, 1977, plaintiffs M&I Marshall & Ilsley Bank and Marine National Exchange

Bank of Milwaukee were larger commercial banking institutions as compared to Midland and plaintiff Heritage Bank Milwaukee was a smaller commercial banking institution as compared to Midland. Midland was engaged in competition with the plaintiff banks, including without limitation in Milwaukee and the State of Wisconsin, for banking business and other services rendered by commercial banking institutions. At that time, First Bank was a relatively small bank with deposits of approximately $54,500,000 as of December 31, 1976, and competition between First Bank and the plaintiffs in the Milwaukee banking market was minimal.

15. Effective July 23, 1977, First Bank, with the financial backing and support of First Bank System, acquired substantially all the assets and assumed substantially all the liabilities of Midland. In connection with such acquisition of assets and assumption of liabilities, First Bank paid to Midland a purchase price of $12,994,005. Under the agreement for the acquisition of Midland by First Bank, the acquisition was expressly conditioned upon the approval of the Comptroller for establishment of a new branch bank of First Bank at Midland's Milwaukee location (hereinafter referred to as the Milwaukee Office).

16. Both First Bank and Midland were at all times relevant hereto insured by the Federal Deposit Insurance Corporation and each was an "insured bank" within the meaning of 12 U.S.C.§1828(c), such that the acquisition of Midland by First Bank required the approval of the Comptroller.

17. By a decision dated July 23, 1977 (hereinafter referred to as the Decision), the Comptroller approved the application of First Bank to purchase the assets and assume the liabilities of Midland. A copy of the Decision is annexed hereto and incorporated herein as Exhibit A.

18. Upon information and belief, the Decision was based upon the facts, opinions and conclusions set forth

in the affidavit of Robert Bloom, First Deputy Comptroller of the Currency (hereinafter referred to as the Affidavit), a copy of which is annexed hereto and incorporated herein as Exhibit B.

19. In connection with the Decision, the Comptroller granted First Bank the right to establish and operate a branch of First Bank in Milwaukee. From and after the acquisition of Midland by First Bank, First Bank established and has operated the Milwaukee Office as a branch bank, and as such engages in competition from such location with the plaintiff banks for banking business and other services rendered by commercial banking institutions.

20. Pursuant to 12 U.S.C. §81, First Bank, as a national banking association, may transact its general business only in LaCrosse, Wisconsin, and in the branch or branches, if any, established or maintained by it in accordance with the provisions of 12 U.S.C. §36.

21. Pursuant to 12 U.S.C. §36, the establishment of a branch bank by First Bank requires the approval of the Comptroller and First Bank was permitted to establish and operate a new branch at the Milwaukee Office only if such establishment and operation were at the time authorized to state banks by the statute law of the State of Wisconsin by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State of Wisconsin on state banks. Such requirements and restrictions of 12 U.S.C. §36 are based upon the national policy of competitive equality between national banks and state banks with respect to the establishment and operation of branch banks.

22. Under the statute law of the State of Wisconsin, specifically Section 221.04(1)(f), Wisconsin Statutues, a state bank located in the City of LaCrosse, and by virtue of 12 U.S.C. §36, a national bank such as First Bank, is prohibited from establishing and operating a branch bank in Milwaukee, a city approximately 200 miles from

the City of LaCrosse, unless the establishment and operation of such a branch is within one of the limited exceptions to the Wisconsin branch bank prohibition. Such branch bank prohibitions are based upon legislative determinations that local banks, such as the plaintiff banks, should not be subjected to competition from the excessive concentration of economic power that is possible through branch bank networks.

23. There is no exception to the Wisconsin branch bank prohibition that would authorize First Bank to establish a branch bank in Milwaukee unless such action was authorized by Section 221.04(1)(j)2. of the Wisconsin Statutes (hereinafter referred to as the Wisconsin Emergency Bank Bank Statute) which provides as follows:

> "2. The limits set forth in subd. 1 may not apply to any emergency situation where the commissioner finds that a bank is failing and that it must be merged or consolidated with another bank and operated as a branch bank for the protection of the depositors of the failing bank and that the opportunity to merge or consolidate with the bank has been offered to and not accepted by all other banks within the geographical limits of subd. 1."

24. Unless the Wisconsin Emergency Branch Bank Statute was applicable and was complied with, First Bank and First Bank System could not compete with plaintiffs through a banking location in Milwaukee, since 12 U.S.C. §36 otherwise prohibited First Bank from establishing a branch bank in Milwaukee and provisions of the Bank Holding Company Act, 12 U.S.C. §1842(a) an (d) prohibited First Bank System, a Minnesota based holding company, from acquiring a Milwaukee bank.

25. Upon information and belief, at the time of the acquisition of Midland by First Bank, the Wisconsin Emergency Branch Bank Statute did not authorize First Bank to establish a branch bank in Milwaukee because there was no emergency situation, Midland

was not failing and Midland did not have to be merged or consolidated with another bank and operated as a branch bank for the protection of its depositors. Such information and belief is based in part upon the fact that (a) First Bank paid nearly $13,000,000 for an allegedly failing bank, (b) First Bank System has publicly stated that negotiations for the acquisition of Midland by First Bank extended over a period of many months, that the form of the acquisition was proposed to First Bank System by the Comptroller, that the acquisition of Midland moved First Bank into a major and very promising new market, that the financial operations of Midland had moved into the black for the quarter preceding the merger and that the acquisition offers significant long-term opportunity for First Bank System, and (c) the depositors of Midland were protected by insurance provided by the Federal Deposit Insurance Corporation and there is no reason to believe that the protection of depositors of Midland required that First Bank be permitted to operate a branch bank in Milwaukee.

26. Upon information and belief, the Comptroller, with knowledge that Midland was not failing and not in any emergency situation, and in willful disregard of the clear and unambiguous requirements of the Wisconsin Emergency Branch Bank Statute and the underlying national policy of competitive equality between national and state banks, secretly and without the knowledge of plaintiffs, wrongfully negotiated and conspired with First Bank System and First Bank to enable First Bank System and First Bank to establish and operate a branch bank at the Milwaukee Office. These actions and Decision of the Comptroller approving such branch bank office are in violation of 12 U.S.C. §36 and Wisconsin Statutes §§221.04(l)(f) and (j), and were arbitrary, capricious, an abuse of discretion, not in accordance with law, in excess of the statutory jurisdiction and authority of the Comptroller, and unwarranted by the facts.

27. As a direct and proximate result of the foregoing

wrongful actions, plaintiffs have been substantially an irreparably injured in the following respects: (a) First Bank System and First Bank were permitted to establish a branch bank office in the immediate proximity of plaintiffs and thereby to compete with plaintiffs through a Milwaukee office in direct violation of the laws regulating branch bank locations; (b) First Bank System and First Bank were permitted to expand their commercial banking operations into the Milwaukee market and business area which is substantially removed from their prior areas of operation, while similar expansion opportunities are denied to plaintiffs; and (c) the Comptroller's action created a double standard under which special rights and privileges have been granted to First Bank and First Bank System which are contrary to law, thereby enabling First Bank System to create illegally a multi-state affiliation of banking institutions with total assets substantially exceeding the combined assets of all plaintiffs.

28. The competitive value inherent in the special and illegal privileges granted by the Comptroller to First Bank is confirmed by the fact that First Bank was willing to pay $13,000,000 to acquire an allegedly failing bank. First Bank has attempted to further exploit such illegal and improper competitive position by various public communications in the Milwaukee area, including:

(a) a news conference statement by John H. Kelly, Chairman of the Board of Midland, on July 24, 1977, which included among other things the statement that "For our community, the new institution brings to the Milwaukee area a revitalization in the banking field, a new competitive stimulus. A holding company as large and distinguished as First Bank System provides us added weight in the marketplace and will put us in an even more favorable position to attract new commercial, industrial and retail business."

(b) a communication by First Bank to former Midland customers which stated among other things 'First Bank System, headquartered in Minneapolis, has assets of nearly $8 billion, and is almost twice the size of any other banking system in Wisconsin." and which further stated "We now have far greater financial resources, which will improve our lending capability and we can now tap new sources of banking skills and professional services as we assist customers with their economic needs.", and

(c) by extensive public advertising in the Milwaukee area including double page advertisements in Milwaukee's two daily newspapers which stated in part "We became part of First Bank System, Inc., a regional bank holding company with 89 banks in five states. This enables us to not only maintain our tradition of innovative financial services, but also to draw upon the resources of the First Bank System (nearly $8 billion in assets), to introduce a level of competition unprecedented in the history of Wisconsin banking."

The monetary damages resulting from these illegally acquired changes in the competitive environment are not capable of determination and an injunction against the continued operation of the illegal branch bank of First Bank in Milwaukee is necessary to remedy this violation of the statutory branch banking restrictions.

29. There are no administrative remedies available to the plaintiffs to correct the legal wrong which they are suffering.

SECOND CLAIM

30. Incorporate by reference Paragraphs 1 through 24 above.

31. In the event the Comptroller was considering authorizing First Bank to establish a branch bank at a location in Milwaukee pursuant to the Wisconsin Emergency Branch Bank Statute, the Comptroller could authorize a branch bank for First Bank at such

location only if the opportunity to merge or consolidate with Midland had first been offered to and not accepted by all other banks, including the plaintiff banks, located within the geographical limits set forth in Wisconsin Statutes, §221.04(1)(j)1. Only under such circumstances could the location of the branch in Milwaukee be permitted for First Bank.

32. The opportunity to acquire, merge or consolidate with Midland was not offered to plaintiffs Marine National Exchange Bank of Milwaukee or Heritage Bank Milwaukee, and upon information and belief, such opportunity was not offered to any other bank within the geographical limit as required by the Wisconsin Emergency Branch Bank Statute except the communication with M&I Marshall & Ilsley Bank described in paragraph 33 below.

33. The opportunity to merge or consolidate with Midland was not offered to the plaintiff M&I Marshall & Ilsley Bank prior to approximately 2:00 P.M. July 22, 1977. At such time, representatives of the Comptroller met with representatives of such plaintiff bank and advised them that they could consider acquisition of Midland but that their decision would have to be made by noon on Sunday, July 24, 1977, and that even if they sought such an acquisition, the necessary approval by the appropriate regulatory authorities could be denied.

As and for an alternative cause of action, plaintiffs allege:

34. The time permitted by the Comptroller for the plaintiff M&I Marshall & Ilsley Bank to consider the acquisition of Midland was arbitrary and unreasonable, particularly in light of the many months permitted First Bank and First Bank System to consider the acquisition of Midland, and made it impossible for such plaintiff to give any meaningful consideration to such possibility.

35. Plaintiffs were, and continue to be, without sufficient knowledge or information concerning the condi-

tion of the assets and liabilities of Midland as of July 23, 1977, so as to determine and allege whether all or any plaintiff bank would have purchased such assets or liabilities on the same terms and conditions as First Bank and First Bank System. In addition, the arbitrary and unilateral action of the Comptroller denied, and continues to deny, plaintiffs the opportunity to revie the condition of such assets an liabilities in order to make such decision, even though First Bank and First Bank System were given such opportunity by the Comptroller over an extended period of time. Nevertheless, in light of the fact that First Bank and First Bank System, after a lengthy and detailed study of the condition of Midland, did decide to acquire and did acquire Midland, the plaintiffs allege, after considering their respective financial and managerial resources, that if the Wisconsin Emergency Branch Bank Statute has been applicable and had been complied with, one or more of the plaintiff banks would have accepted the opportunity to acquire Midland upon terms that would have protected the depositors of Midland.

36. The Decision (Exhibit A), the Affidavit (Exhibit B), and the actions of the Comptroller reflect the arbitrary and collusive opinion of the Comptroller that no bank in the Milwaukee area could properly be considered a prospective purchaser of Midland and the willful disregard by the Comptroller of the clear and unambiguous requirements of 12 U.S.C. §36 and the Wisconsin Emergency Branch Bank Statute.

37. Upon information and belief, the Comptroller, in willful disregard of the clear and unambiguous requirements of the Wisconsin Emergency Branch Bank Statute and the underlying national policy of competitive equality between national and state banks, secretly and without the knowledge of plaintiffs, wrongfully negotiated and conspired with First Bank System and First Bank to enable First Bank System and First Bank to establish and operate a branch bank at the Milwaukee Office. These actions and Decision of the

Comptroller approving such branch bank office are in violation of 12 U.S.C. §36 and Wisconsin Statutes, §§221.04(l)(f) and (j), and were arbitrary, capricious, an abuse of discretion, not in accordance with law, in excess of the statutory jurisdiction and authority of the Comptroller, and unwarranted by the facts.

38. Incorporate by reference Paragraphs 27 through 29 above.

WHEREFORE, plaintiffs pray:

1. That the court issue a declaratory judgment that the establishment and operation of a branch bank by First Bank and First Bank System in the City of Milwaukee, and the approval thereof by the Comptroller, was and is contrary to law;

2. That First Bank and First Bank System be ordered to cease operation of a branch bank in the City of Milwaukee; and

3. That the court award to the plaintiffs their costs, disbursements and attorney's fees and grant such other and further relief as it deems appropriate.

Marshall & Ilsley Corporation, M&I Marshall & Ilsley Bank, The Marine Corporation, Marine National Exchange Bank of Milwaukee, Heritage Wisconsin Corporation and Heritage Bank Milwaukee

By /S/ James Urdan
James Urdan

/S/ Robert P. Harland
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APPENDIX E

STATUTES

United States Code:

5 U.S.C. §702 provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. §704 provides:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.

> Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

12 U.S.C. §36(c) provides in pertinent part:

> A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. . .

12 U.S.C. §181 provides in pertinent part:

> Any association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock. If the liquidation is to be effected in whole or in part through the sale of any of its assets to and the assumption of its deposit liabilities by another bank, the purchase and sale agreement must also be appoved by its shareholders owning two-thirds of its stock unless an emergency exists and the Comptroller of the Currency specifically waives such requirement for shareholder approval.

12 U.S.C. §1828(c) provides in pertinent part:

> (1) Except with the prior written approval of the responsible agency, which shall be in every case referred to in this paragraph be the Corporation, no insured bank shall —
>
> > (A) merge or consolidate with any noninsured bank or institution;
> >
> > (B) assume liability to pay any deposits (including liabilities which would be "deposits" except for the proviso in section 1813 (l)(5) of this title) made in, or similar liabilities of, any noninsured bank or institution;
> >
> > (C) transfer assets to any noninsured bank or institution in consideration of the assumption of liabilities for any portion of the deposits made in such insured bank.
>
> (2) No insured bank shall merge or consolidate with any other insured bank or, either directly or indirectly, acquire the assets of, or assume liability to pay any deposits made in, any other insured bank except with the prior written approval of the responsible agency, which shall be —
>
> > (A) the Comptroller of the Currency if the acquiring, assuming, or resulting bank is to be a national bank or a District bank;. . .

12 U.S.C. §1842(a) provides in pertinent part:

> It shall be unlawful except with the prior approval of the Board, (1) for any action to be taken that causes any company to become a bank holding company; (2) for any action to be taken that causes a bank to become a subsidiary of a bank holding company; (3) for any bank holding company to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company will directly or indirectly own or control more than 5 per centum of the voting shares of such bank; (4) for any bank holding company or subsidiary thereof, other

than a bank, to acquire all or substantially all of the assets of a bank; or (5) for any bank holding company to merge or consolidate with any other bank holding company....

12 U.S.C. §1842(d)(1) provides:

(d)(1) *Limitation by State boundaries.* Notwithstanding any other provision of this section, no application shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on July 1, 1966 or the date on which such company became a bank holding company, whichever is later, unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication. For the purposes of this section, the State in which the operations of a bank holding company's subsidiaries are principally conducted is that State in which total deposits of all such banking subsidiaries are largest.

Wisconsin Statutes:

Wis. Stat. §221.04 provides, in pertinent part:

221.04 *Powers.* (1) *General.* Upon the execution and filing of the articles of incorporation with the commissioner of banking and the approval by the commissioner, and upon the filing of an approved copy of such articles with the register of deeds of the county in which the bank is to be located, the bank shall become a body corporate, and in addition to the powers conferred by the general corporations law, subject to the restrictions and limitations contained in this section, having the following powers:

. . . .

(f) To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers necessary to carry on the business of banking;. . . but no bank shall establish more than one office of deposit and discount or, except as provided under pars. (i), (j) and (m), establish branch offices, branch banks or bank stations,

. . . .

(i) To establish and maintain, upon approval by the commissioner, a bank station, as defined by the commissioner, exclusively to receive deposits, permit withdrawals, issue cashiers' checks, money orders, drafts and travelers' checks and provide safekeeping and safety deposit services in any town completely surrounded by outlying waters and having no bank or place where such banking may be done in the town or readily accessible to all persons of the town desiring the service. A bank whose home bank is located on a body of land completely surrounded by outlying waters, as defined in s. 29.01(4), may establish and maintain a bank station across such outlying waters from the home bank but within the same municipality. Such a bank station is not subject to the 3-mile limitation of par. (j). Interpretation of this paragraph by the comptroller of currency to mean that a national bank may establish a bank station, branch bank or branch office in any place or town other than in one completely surrounded by outlying waters will render this paragraph void.

(j) 1. To establish and maintain a branch bank, upon approval by the commissioner and the banking review board, in a municipality other than that in which the home bank is located, if such municipality has no bank or branch bank at the time of application and if no bank or branch bank is located within a radius of 3 miles from the proposed site of the branch; however, such 3-mile limitation shall be computed by measuring the street or road mileage of that route which the commissioner and board find would be ordinarily and customarily traveled as the shortest distance between such bank or branch bank and the proposed site of the branch. A branch bank established under this paragraph shall be located in the same county in which the home bank is located or in a contiguous county if the location of such branch bank is no more than 25 miles from the home bank. Such branch banks shall be subject to all laws, rules and regulations applicable to banks generally. Application for the establishment of a branch bank under this paragraph shall be made to the commissioner on a form furnished by the commissioner.

2. The limits set forth in subd. 1 may not apply to any emergency situation where the commissioner finds that a bank is failing and that it must be merged or consolidated with another bank and operated as a branch bank for the protection of the depositors of the failing bank and that the opportunity to merge or consolidate with the bank has been offered to and not accepted by all other banks within the geographical limits of subd. 1.

Opposition

1

Office - Supreme Court, U.S.
FILED
JAN 22 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-964

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MARSHALL & ILSLEY CORPORATION, M & I MARSHALL
& ILSLEY BANK, THE MARINE CORPORATION,
MARINE NATIONAL EXCHANGE BANK OF MILWAUKEE,
HERITAGE WISCONSIN CORPORATION,
and HERITAGE BANK MILWAUKEE, *Petitioners*,

v.

C. TODD CONOVER, Comptroller of the Currency
of the United States, FIRST BANK (N.A.), and
FIRST BANK SYSTEM, INC., *Respondents*.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION BY FIRST BANK (N.A.) AND FIRST BANK SYSTEM, INC.

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED

Whether this Court should grant a petition for a writ of certiorari where

(a) the court of appeals' conventional application of the doctrine of standing is fully consistent with prior decisions of this Court and with decisions of other circuits,

(b) the court of appeals' decision has minimal precedential significance, and

(c) the court of appeals' holding that the Bank Holding Company Act creates no private civil action in the district courts was compelled by prior decisional law.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-964

MARSHALL & ILSLEY CORPORATION, M & I MARSHALL
& ILSLEY BANK, THE MARINE CORPORATION,
MARINE NATIONAL EXCHANGE BANK OF MILWAUKEE,
HERITAGE WISCONSIN CORPORATION,
and HERITAGE BANK MILWAUKEE, *Petitioners*,

v.

C. TODD CONOVER, Comptroller of the Currency
of the United States, FIRST BANK (N.A.), and
FIRST BANK SYSTEM, INC., *Respondents*.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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BRIEF IN OPPOSITION BY FIRST BANK (N.A.) AND FIRST BANK SYSTEM, INC.

STATEMENT OF THE CASE

1. The Decision Of The Comptroller Of The Currency.

In June 1977 the Comptroller of the Currency ("Comptroller") determined, based upon his examinations of Midland National Bank of Milwaukee, Wisconsin ("Midland"), that Midland was in imminent danger of failure.[1] To prevent this probable failure, the Comptroller approved the sale of Midland's assets to, and the assumption of Midland's deposit liabilities by, respondent First Bank (N.A.) of LaCrosse, Wisconsin ("First Bank").[2] The Comptroller's approval relied upon emergency provisions of both federal[3] and state banking statutes.

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[1] Petition for Certiorari ("Pet.") App. D-12, D-13. From the fall of 1975 through spring of 1977, Midland experienced increasingly serious financial difficulties, particularly in its real estate loan portfolio. *Id.* at D-13. Loan losses skyrocketed from $342,000 to $5.2 million. *Id.* at D-17. Loans of

The state of Wisconsin authorizes the establishment of branch banks in two circumstances. First, a branch bank may be established in a "bankless community" — that is, in a municipality that has no bank, if the location of the proposed branch

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"doubtful" collectability increased from $3.2 million to $14.9 million. *Id.* This deterioration in Midland's asset structure seriously impaired the bank's ability to convert its assets to cash in order to meet the ordinary demands of depositors and creditors. *Id.* at D-18.

The bank's problems were exacerbated by the "extreme volatility" of its deposit structure. Pet. App. D-19. At the end of 1976, forty-eight percent of the bank's time deposits consisted of certificates of deposit of $100,000 or more. *Id.* Holders of these certificates included public agencies which, in the view of the Comptroller's office, were "extraordinarily sensitive to adverse financial trends and negative publicity about financial institutions." *Id.* It was apparent by February 1977 that Midland's loan portfolio problems and volatile deposit structure would result in the bank's failure unless additional capital could soon be found. *Id.*

[2] Pet. App. D-14. Title 12 U.S.C. § 1828(c)(2)(A) requires "prior written approval" by the Comptroller of any transaction in which a national bank is to merge or consolidate with, acquire the assets of, or assume the liabilities of, another bank.

Before the Midland transaction, First Bank was named "National Bank of Wisconsin in LaCrosse." Its name was changed at the time of the Midland acquisition to "First Bank (N.A.)."

[3] Under 12 U.S.C. § 181, the liquidation of a national bank through the sale of its assets requires shareholder approval unless the Comptroller determines that "an emergency exists" and "specifically waives" such shareholder approval. Title 12 U.S.C. § 1828(c)(6) permits the transaction to be consummated immediately if the Comptroller finds that he "must act immediately to prevent the probable failure of one of the banks involved. . . ."

bank would satisfy specified geographical limits.[4] Second, a branch bank may be established under Wisconsin's "emergency branch banking" provision — that is, in "any emergency situation" where "a bank is failing and . . . must be merged or consolidated with another bank and operated as a branch bank for the protection of the depositors of the failing bank."[5] The Comptroller's approval under this latter provision permitted Midland's former office to be retained by First Bank and operated as a branch.

The purchase of assets and assumption of liabilities promptly was consummated. First Bank's parent holding company, respondent First Bank System, Inc., then injected $10 million of new capital into the combined First Bank/Midland and paid Midland shareholders $13 million, which was distributed to them during the next six months as liquidating dividends. First Bank since July 25, 1977 has operated a branch bank at Midland's former office. Pet. App. D-4, D-9.

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[4] Wis. Stat. § 221.04(1)(j)1 authorizes, with the state banking commissioner's approval, the establishment of a branch bank —

> in a municipality other than that in which the home bank is located, if such municipality has no bank or branch bank at the time of application and if no bank or branch bank is located within a radius of 3 miles from the proposed site of the branch. . . . A branch bank established under this paragraph shall be located in the same country in which the home bank is located or in a contiguous county if the location of such branch bank is no more than 25 miles from the home bank.

[5] Wis. Stat. § 221.04(1)(j)2 provides:

> The limits set forth in subd. 1 may not apply to any emergency situation where the commissioner finds that a bank is failing and that it must be merged or consolidated with another bank and operated as a branch bank for the protection of the depositors of the failing bank and that the opportunity to merge or consolidate with the bank has been offered to and not accepted by all other banks within the geographical limits of subd. 1.

2. Proceedings In The District Court.

Six months after the acquisition was consummated, the petitioners, who consist of three Milwaukee banks and their parent holding companies (collectively "Milwaukee banks" or "petitioners"), filed this action in the United States District Court for the Western District of Wisconsin. The Milwaukee banks contested the Comptroller's decision under the Wisconsin emergency branching provision to permit First Bank of La-Crosse to operate the former Midland office in Milwaukee as a branch.[6] Petitioners also alleged that the Comptroller violated the Bank Holding Company Act ("BHCA") by permitting the acquisition without the approval of the Federal Reserve Board. Pet. App. D-7, D-10.

The district court found that the petitioners had failed to allege any "injury in fact," and dismissed the branch banking claim for lack of standing. Pet. App. B-13, B-22. The district court also dismissed for lack of subject matter jurisdiction petitioners' BHCA allegations. *Id.* at B-22. Petitioners' amended complaint similarly was dismissed for lack of standing, and final judgment was entered for respondents. *Id.* at B-23 through B-34.

3. The Court Of Appeals' Decision.

A unanimous panel of the United States Court of Appeals for the Seventh Circuit affirmed, agreeing with the district court that the Wisconsin emergency branching statute conferred no standing upon the petitioners.[7] Employing the familiar two-pronged test, the court of appeals first examined petitioners' allegations to determine whether the actions they challenged had caused them any "injury in fact, economic or otherwise."[8] Pet. App. A-7. Holding this part of the test to have been satisfied, the court of appeals then turned to whether "the interest sought to be protected by the complainant[s] is arguably within the zone of interests to be protected or regulated by the statute . . . in question." Pet. App. A-7 (quoting *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 153 (1970)).

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[6] Petitioners did not contest the Comptroller's finding of an emergency under the two federal statutes, 12 U.S.C. §§ 181 and 1828(c)(6).

[7] Marshall & Ilsley Corp. v. Heimann, 652 F.2d 685 (7th Cir. 1981), Pet. App. A-1.

The court of appeals held that petitioners' interests as competitors of First Bank/Midland were not within the zone of interests protected by the Wisconsin emergency statute.[9] The court of appeals found on the face of Wis. Stat. § 221.04 (1)(j)2 a "clear statutory pronouncement" as to its intended beneficiaries: any decision that a bank is failing and must be operated as a branch of another bank is to be made "for the protection of *depositors*." Pet. App. A-18. This intention would be "thwarted," the court of appeals reasoned, if competing banks were permitted to derail the rescue of a failing bank on the basis of their own economic interests in keeping competitors out of the local banking community.[10]

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[8] Respondents First Bank and First Bank System continue to believe, for the reasons stated by the district court (Pet. App. B-9 through B-13, B-27 through B-32), that petitioners suffered no injury in fact.

[9] Pet. App. A-13. The court of appeals correctly recognized that petitioners "base their standing arguments on state branch banking law." *Id.* Nevertheless, the court of appeals also considered petitioners' standing under the emergency provisions of 12 U.S.C. §§ 181 and 1828(c)(6), as well as under the Wisconsin statute. *Id.* at A-13 through A-15. Petitioners do not challenge the court of appeals' conclusion that petitioners lacked standing under the federal statutes.

[10] Pet. App. A-19. The court of appeals concluded that "[c]ompetitor banks are strangers to the failure determination, even though their competitive interests might be affected by eventual Comptroller action." Pet. App. A-21. *Cf.* Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 50 U.S.L.W. 4103, 4108 (U.S. Jan. 12,

The court of appeals also found the Wisconsin emergency statute not to have conferred upon petitioners any legally cognizable interests as potential acquirers of Midland. The court of appeals concluded: (a) that only those banks which could have operated the failing bank as a branch bank without contravening the geographical limitations of the "bankless community" section, Wis. Stat. § 221.04 (1)(j)1, were entitled to an offer under the emergency branching provision, Wis. Stat. § 221.04 (1)(j)2, and (b) that only those banks entitled to an offer fell within the zone of interests protected by the "offer" provision of the emergency statute.[11] Since none of the petitioner banks satisfied the geographical limitations of Wis. Stat. § 221.04 (1)(j)1, none was entitled to an offer under § 221.04 (1)(j)2, and thus that statute conferred no standing on petitioners as potential acquirers of Midland.

As to the Bank Holding Company Act claim, the court of appeals affirmed the district court's ruling that the exclusive remedy for such a claim was a proceeding before the Federal Reserve Board, with judicial review in the courts of appeals. The court of appeals held that the BHCA creates no private civil action cognizable in the district courts. Pet. App. A-25.

A timely petition for rehearing and for rehearing in banc was denied. Pet. App. C-3.

1981) ("This Court repeatedly has rejected claims of standing predicated on 'the right, possessed by every citizen, to require that the Government be administered according to law. . . .' ").

[11] Pet. App. A-20, A-21. Thus, under the court of appeals' interpretation of Wisconsin law, in order to be entitled to an offer to merge with a failing bank, the prospect bank (1) must be located in a different community from the failing bank and (2) must be located at least three miles from the failing bank. The petitioner banks and the former Midland facility are all located in Milwaukee, and all within a one-half mile radius of each other. Pet. 3.

REASONS FOR DENYING THE WRIT

I. The Court Of Appeals' Decision Is Fully Consistent With Decisions Of This Court And Of Other Circuits, Is Of Limited Precedential Impact, And Presents No Occasion For This Court To Reconsider Use Of The "Zone Of Interests" Test As A Prudential Limitation On Standing.

Petitioners' first asserted reason for granting the writ is that "use of the 'zone of interests' test to deny standing . . . erroneously utilizes a requirement abandoned by this Court . . . ." Pet. 5. Just last week, however, this Court stated:

> Beyond the constitutional requirements, the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing . . . . [T]he Court has required that the plaintiff's complaint fall within "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Data Processing Service* v. *Camp,* 397 U.S. 150, 153 (1969).

Valley Forge Christian College v. *Americans United for Separation of Church and State, Inc.*, 50 U.S.L.W. 4103, 4106 (U.S. Jan. 12, 1982).

The court of appeals' decision is consistent not only with this recent reaffirmation of the "zone of interests" requirement for standing,but also with other decisions of this Court [12] and of other circuit courts of appeals.[13] As a "prudential" limitation on the judicial power of the federal courts,[14] the zone of interests requirement is founded upon the concerns embodied in Article III of the Constitution.[15] It bears a "close relationship" to the Article III limitation of the judicial power only to "those disputes which confine federal courts to a role consistent with a system of separated powers and which are thought to be capable of resolution through the judicial process." *Valley Forge, supra* at 4105, 4106 (quoting *Flast* v. *Cohen,* 392 U.S. 83, 97 (1968)). Thus, at bottom, the zone of interests test serves to define the "proper — and properly limited — role of the courts in a democratic society."[16]

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[12] *E.g.*, Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 n.6 (1979) (citing, as an example of a "nonconstitutional limitation on standing," the rule that "the interest of the plaintiff, regardless of its nature in the absolute, [must] at least be 'arguably within the zone of interests to be protected or regulated' by the statutory framework within which his claim arises"); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 39 n.19 (1976) (noting with approval that the *Data Processing* decision "established" the zone of interests requirement but declining to consider such requirement in light of disposition denying standing on ground that relief requested would not remedy the harm alleged); United States v. SCRAP, 412 U.S. 669, 686 & n.13 (1973) (citing zone of interests test with approval and noting lack of dispute that the "environmental interest" of SCRAP was

The court of appeals' insistence that petitioners lacked standing unless they fell within the zone of interests protected by the statute allegedly violated thus was compelled by this Court's decisions, and presents no reason for granting a writ of certiorari.

Neither is a writ warranted to review the application of the zone of interests standard to this particular case. Petitioners' standing turns merely upon the construction to be given a statute

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within the interests to be protected by the National Environmental Policy Act); *see also* Sierra Club v. Morton, 405 U.S. 727, 733 n.5 (1972) (citing cases).

[13] *E.g.*, Control Data Corp. v. Baldridge, 655 F.2d 283, 289-96 (D.C. Cir.), *cert. denied*, 50 U.S.L.W. 3250 (U.S. Oct. 6, 1981); Independent Bankers Ass'n of America v. Heimann, 613 F.2d 1164 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980); Hood River County v. United States, 532 F.2d 1236, 1238 (9th Cir. 1976); Churchill Truck Lines, Inc. v. United States, 533 F.2d 411 (8th Cir. 1976); Clinton Community Hosp. Corp. v. Southern Md. Medical Center, 510 F.2d 1037 (4th Cir.), *cert. denied*, 422 U.S. 1048 (1975); Intercontinental Placement Service, Inc. v. Shultz, 461 F.2d 222 (3d Cir. 1972).

[14] Warth v. Seldin, 422 U.S. 490, 500 (1975).

[15] Valley Forge, *supra* at 4106; Tax Analysts & Advocates v. Blumenthal, 566 F.2d 130, 140 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978).

[16] Warth v. Seldin, 422 U.S. 490, 498 (1975).

of the state of Wisconsin, and the decision below has little significance outside that state. The court of appeals' reading of the Wisconsin statute was a reasonable and permissible one, fully in accord with decisions of the Wisconsin Supreme Court on the subject.[17] The court of appeals' decision — sustaining a non-recurring financial transaction long since consummated — promises to have minimal, if any, impact beyond the particular parties to this litigation.[18]

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[17] In *First Nat'l Bank of Wisconsin Rapids v. M&I Peoples Bank of Coloma*, 95 Wis. 2d 303, 290 N.W. 2d 321 (1980), the Wisconsin Supreme Court held that the Wisconsin branch banking statute did not afford competitor banks standing to sue. In *Coloma* the court construed Wis. Stat. § 221.04 (1)(j)1, the provision allowing branch banking in "bankless communities." The court stated flatly that this provision "does not evince an intent to protect competitors." 290 N.W. 2d at 327. *See also* State Bank of Drummond v. Nuesse, 13 Wis. 2d 74, 82, 108 N.W. 2d 283, 287 (1961) (purpose of restrictions on branch banking is to protect the "state's economy . . . from the threats of undue concentration and monopoly in banking").

Petitioners continue to rely upon cases which measured the zone of interests protected by laws other than Wisconsin's branch banking statute. Pet. 7-8 (citing cases). Obviously those cases are of little assistance in determining the policies of the Wisconsin legislature.

[18] Indeed, it is doubtful that this litigation, however concluded, could have had any practical impact even on the petitioners' situation. Granting petitioners the relief they sought in their amended complaint — divestiture by First Bank of the former Midland office — would not have remedied the injury of which they complained. Petitioners lack standing for this additional reason. Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979); Physicians' Educ. Network, Inc. v. Department of HEW, 653 F.2d 621, 626 (D.C. Cir. 1981); *see* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976) ("when a plaintiff's standing is brought into issue the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision"); *accord*, Warth v. Seldin, 422 U.S. 490, 508 (1975); Linda R.S. v. Richard D., 410 U.S. 614, 618 (1973). Even if the requested relief had been granted, the Comptroller would be under a continuing duty — imposed by federal and state law — to offer Midland to a viable banking entity with the resources to maintain Midland as a strong, competitive member of the

Petitioners' other thinly veiled strawman on the standing issue — that since they alleged in their complaint that in truth no emergency existed, the court of appeals committed "clear error" in looking to the emergency provision to assess their standing[19] — is equally unavailing. This contention misconceives a court's duty in determining a party's standing to sue. Standing does not depend on the "truth" or "falsity" of the allegations of the complaint. Rather, it depends upon the position of the plaintiff — that is, whether, because of the nature of his claimed injury and the apparent purpose of the statute he invokes, he is a proper party to raise the merits in the first instance.[20] As the court of appeals correctly recognized, "[t]he

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Milwaukee banking community. Divestiture by First Bank of the Midland location would result, as the district court correctly stated, in "no economic benefit to plaintiffs, other than that which might result from a period of uncertainty over Midland's ownership." Pet. App. B-15.

Petitioners' allegation that "one or more of the plaintiff banks would have accepted the opportunity to acquire Midland upon terms that would have protected the depositors of Midland," Pet. App. D-33, is wholly speculative. Petitioners failed to show that any of them possessed the resources necessary for the purchase of Midland and thus failed to show any substantial likelihood that any of them would or could actually undertake the purchase. Such "unadorned speculation will not suffice to invoke the federal judicial power." Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 44 (1976); Physicians' Educ. Network, Inc. v. Department of HEW, 653 F.2d 621, 627 (D.C. Cir. 1981).

[19] Pet. 14. Petitioners' amended complaint alleged that "Midland was not failing and not in any emergency situation," and that the Comptroller's approval thus was "in willful disregard of the clear and unambiguous requirements of the Wisconsin Emergency Branch Bank Statute . . . ." Pet. App. D-29.

[20] *See* Warth v. Seldin, 422 U.S. 490, 498 (1975) ("In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."). A plaintiff's standing is a matter apart from the merits of the substantive claims he raises. 422 U.S. at 500.

emergency provision in carving out an exception to the Wisconsin branch banking provisions, also carves out competitors' standing to challenge the application of the exception." Pet. App. A-18.

Petitioners incant the rule that a district court deciding a dismissal motion must accept the allegations of the complaint as true, and, repeating that the "failing bank exception does *not* apply," lament the court of appeals' deciding the case "as if the exception *did* apply." Pet. 14. But, because the emergency provision protects no interest of the petitioners, not even the clearest violation of that provision could confer upon them standing to sue. No amount of italic typesetting will mask the fact that the court of appeals' decision regarding standing correctly looked, not to the merits of petitioners' claims, but to the entitlement of the petitioners to raise those claims at all.

II. The Court Of Appeals' Holding That The Bank Holding Company Act Creates No Private Civil Action In The District Courts Was Compelled By Prior Decisional Law.

For the fourth time in this litigation, the Milwaukee banks press their make-weight assertion that the Comptroller's approval of the acquisition of Midland by First Bank violated the Bank Holding Company Act ("BHCA").[21] The court of appeals properly affirmed the district court's holding that no provision is made in the BHCA for private civil actions in the district courts. Pet. App. A-25.

Petitioners fail to identify any prior decision of any court with which the court of appeals' decision could possibly conflict. Indeed, the decision below was compelled by the prior decision of this Court in *Whitney National Bank* v. *Bank of New Orleans*

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[21] As the court of appeals correctly noted, the restrictions of the Bank Holding Company Act alleged to have been violated "do not, on their face, apply here." Pet. App. A-24.

& *Trust Co.*, 379 U.S. 411 (1965). In *Whitney*, the Court held that the exclusive remedy for any claimed violation of the BHCA is an administrative proceeding before the Board of Governors of the Federal Reserve System ("Board"), with judicial review exclusively in the courts of appeals. 379 U.S. at 419-23. Other decisions applying the BHCA have consistently recognized the exclusiveness of its remedies and review provisions.[22]

Petitioners seek to circumvent this well-settled law by asserting that "[h]ere there is no such problem of conflicting jurisdiction" between the Board and the Comptroller, that the Board "is not in any way involved" in this litigation, and that independent jurisdiction to challenge the Comptroller's actions exists under the Administrative Procedure Act. Pet. 19. But, as this Court emphasized in *Whitney*, 379 U.S. at 419-21, Congress has provided for questions arising under the BHCA first to be addressed to and decided by the Board, so that the courts, in later exclusive review proceedings, will benefit from the Board's prior exercise of its expertise. The Administrative Procedure Act does not alter this result or confer jurisdiction on the district courts. *Memphis Trust Co.* v. *Board of Governors*, 584 F.2d 921, 925 (6th Cir. 1978); *cf. Califano* v. *Sanders*, 430 U.S. 99, 104-07 (1977).

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[22] *E.g.*, American Bank of Tulsa v. Smith, 503 F.2d 784, 786 (10th Cir. 1974) (finding it "clear that the District Court lacked jurisdiction to determine the merits of the alleged violation of the Holding Company Act"); South Dakota v. National Bank of South Dakota, 335 F.2d 444, 448 (8th Cir. 1964), *cert. denied*, 379 U.S. 970 (1965) ("The Act and its legislative history disclose no intent on the part of Congress to create rights to be enforced by civil litigation.").

CONCLUSION

For the foregoing reasons, First Bank and First Bank System request this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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Opposition

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No. 81-964

In the Supreme Court of the United States

OCTOBER TERM, 1981

MARSHALL & ILSLEY CORPORATION, ET AL., PETITIONERS

v.

C. TODD CONOVER, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether competitor banks have standing under the Wisconsin branch banking law, Wis. Stat. Ann. § 221.04(1)(j) (West Cum. Supp. 1981), as incorporated by 12 U.S.C. 36(c), to challenge the decision of the Comptroller of the Currency that an emergency situation exists because a bank is failing.

2. Whether petitioners are banks located within the geographical limits of Wis. Stat. Ann § 221.04(1)(j)1 (West Cum. Supp. 1981).

3. Whether petitioners are entitled to bring an action against the Comptroller on the ground that the Bank Holding Company Act, 12 U.S.C. (Supp. IV) 1842(a), requires Federal Reserve Board approval of a particular bank merger.

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In the Supreme Court of the United States

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No. 81-964

MARSHALL & ILSLEY CORPORATION, ET AL., PETITIONERS

v.

C. TODD CONOVER, COMPTROLLER OF THE CURRENCY
OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-29) is reported at 652 F. 2d 685. The opinion of the district court (Pet. App. B-1 to B-34) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1981 (Pet. App. C-1). A petition for rehearing was denied on August 26, 1981 (Pet. App. C-3). The petition for a writ of certiorari was filed on November 20, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant statutory provisions are set forth at Pet. App. E-1 to E-6.

STATEMENT

1. Under the National Bank Act, 12 U.S.C. (& Supp. IV) 21 *et seq.*, the Comptroller of the Currency of the United States is the regulatory official responsible for the direct supervision of national banks and the national banking system. The Bank Merger Act, 12 U.S.C. (& Supp. IV) 1828(c), ordinarily requires written approval of a bank merger by the Comptroller pursuant to specified notice procedures. However, the Comptroller is authorized to waive these procedures if he finds it necessary to "act immediately in order to prevent the probable failure" of a bank. 12 U.S.C. 1828(c)(3). Similarly, the Comptroller is authorized to waive the requirement of shareholder approval of the sale of a bank's assets to another bank if "an emergency exists." 12 U.S.C. 181.

In addition, 12 U.S.C. 36(c) provides that the Comptroller may approve a branch of a national bank only if state law prerequisites to branching are satisfied. Branch banking in Wisconsin is permitted only in specific circumstances provided by statute. Wis. Stat. Ann. § 221.04(1)(f) (West Cum. Supp. 1981). Under the "bankless community" exception, a bank is permitted to establish a branch in a municipality that has no bank or branch bank only if (i) there is no bank or branch bank within three miles of the proposed bank and (ii) the home bank is in the same county as the branch or is in a contiguous county and within 25 miles of the proposed branch. Wis. Stat. Ann. § 221.04(1)(j)1 (West Cum. Supp. 1981). Section 221.04(1)(j)2 of the statute provides an exception for mergers with failing banks:

> The limits set forth in subd. 1 [the "bankless community" exception] may not apply to any emergency situations where the commissioner finds that a bank is failing and that it must be merged or consolidated with another bank and operated as a branch bank for the protection of the depositors of the failing bank and

> that the opportunity to merge or consolidate with the bank has been offered to and not accepted by all other banks within the geographical limits of subd. 1.

2. Between the fall of 1975 and the spring of 1977, Midland National Bank of Milwaukee suffered a severe and continuing deterioration in its asset structure that threatened its survival unless it received a massive injection of capital (Pet. App. A-3). In a decision dated July 23, 1977, the Comptroller approved the application of respondent First Bank (N.A.) to purchase the assets and assume substantially all of the liabilities of Midland (*id.* at A-3, D-12 to D-15). Pursuant to 12 U.S.C. 181 and 12 U.S.C. (& Supp. IV) 1828(c), the Comptroller waived the requirement of shareholder approval for the merger and certain other requirements of bank mergers based on his determination that Midland's situation was an emergency (Pet. App. A-4). Specifically, the Comptroller found (*id.* at D-13) that "the p[r]ecarious financial condition of [Midland] and the likelihood that a failure immediately to consummate this proposed transaction will result in the probable failure of [Midland], with all of the attendant injury to depositors, creditors, and shareholders." First Bank than acquired Midland for approximately $13 million, which was distributed as liquidating dividends to Midland stockholders, and since July 1977 it has operated a branch bank at Midland's former office.

In January 1978, petitioners, three Milwaukee banks and the holding companies that own them, brought this suit for declaratory and injunctive relief in the United States District Court for the Western District of Wisconsin challenging the Comptroller's decision. The district court initially dismissed without prejudice the branch banking claim on the ground that petitioners did not allege any injury (Pet. App. B-22). Petitioners then filed an amended complaint (*id.* at D-23 to D-35), which charged that the Comptroller's actions in allowing First Bank to acquire Midland's assets and to operate the former Midland facility as a branch bank violated § 221.04(1)(j)2 because there was no "emergency" at the time he acted (Count I). The complaint also charged that, even if there was an emergency, the Comptroller violated the statute by failing first to offer the acquisition of Midland to petitioners and other banks "within the geographical limits of subd. 1" (Count II).

The district court dismissed petitioners' amended complaint for lack of standing. As to Count I the court held that "vague references to an unidentified threatened economic injury as of July 1977 will [not] sustain a complaint filed in September 1978" (Pet. App. B-31). Thus, the court held, petitioners failed to allege any injury in fact. The court also dismissed Count II. The court reasoned that the provision of the state statute concerning offers to other banks is not binding on the Comptroller because it is not a "restriction on location" and because the provision conflicts with the overriding federal policy of giving the Comptroller the ability to move quickly to save failing banks. Accordingly, the court held that petitioners lacked standing and that Count II did not state a claim upon which relief could be granted (*id.* at B-34).[1]

3. The court of appeals affirmed the district court's dismissal for lack of standing, but for different reasons. It held that petitioners lacked standing under *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970), because the interests they asserted were not arguably within the "zone of interests" protected by the

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[1] In its earlier opinion that permitted petitioners to amend their complaint, the court had dismissed for lack of subject matter jurisdiction a claim that the Comptroller's action exceeded his authority because the Bank Holding Company Act, 12 U.S.C. (Supp. IV) 1842(a), required Federal Reserve Board approval of the merger (Pet. App. B-17 to B-22).

emergency provisions of the federal and state statutes that petitioners claimed were violated. The court held that the language and legislative history of 12 U.S.C. 181 make clear that the purpose of the section is to protect the interests of the shareholders of the bank being liquidated and, in the case of a failing bank, its customers (Pet. App. A-13 to A-14). Thus, competitor banks do not fall within the statute's "zone of interests." Similarly, Section 1828(c) provides procedures for the examination of the antitrust implications of proposed bank mergers, which are waived when emergency action is needed to prevent the probable failure of one of the banks involved. Because petitioners made no allegation that the acquisition of Midland by First Bank violated the antitrust laws, the court held that they did not claim infringement of any interest protected by Section 1828(c) (Pet. App. A-15).

The court of appeals also held that competitor banks do not fall within the ambit of interests arguably designed to be protected by Wis. Stat. Ann. § 221.04(1)(j)2 (West Cum. Supp. 1981). The court found (Pet. App. A-18 to A-19; emphasis in original):

> The Wisconsin emergency statute * * * provides on its face that the decision that a bank is failing and must be operated as a branch of another bank is made "for the protection of *depositors*" * * *. This language seems to indicate that competing banks are not within the zone of interests protected by the emergency branch banking statute.
>
> * * * * *
>
> The purpose of both the Wisconsin and federal emergency banking provisions is to restructure the assets and liabilities of a failing bank with a minimum of disruption of services to depositors. If other banks were allowed to challenge the Comptroller's determination of an emergency solely on the basis of their

> status as competitors, the objectives justifying these emergency procedures could be thwarted by the purely selfish desires of competitors to keep a new competitor out of the local banking community.

Moreover, the court held that petitioners lacked standing to challenge the Comptroller's alleged violation of § 221.04(1)(j)2 by failing to offer them the opportunity to acquire Midland because, contrary to petitioners' claim, none of the petitioners fall "within the geographical limits of subd. 1" as required by the statute (Pet. App. A-20).[2]

ARGUMENT

1. Petitioners' primary contention (Pet. 5-12) is that the court of appeals erred in applying the "zone of interests" test of *Association of Data Processing Service Organizations, Inc.* v. *Camp,* 397 U.S. 150 (1970), on the ground that that test has been "abandoned by this Court" (Pet. 5). This contention is insubstantial.

This Court has reaffirmed the vitality of the "zone of interests" test on numerous occasions. See, *e.g., Valley Forge Christian College* v. *Americans United For Separation of Church and State, Inc.,* No. 80-327 (Jan. 12, 1982), slip op. 10; *Gladstone, Realtors* v. *Village of Bellwood,* 441 U.S. 91, 100 n.6 (1979); *Simon* v. *Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 39 n.19 (1976); *Warth* v. *Seldin,* 422 U.S. 490, 500 (1975). And, as the court of appeals recognized (Pet. App. A-11 to A-12), the lower courts consistently have applied this test. See, *e.g.*, *Control Data Corp.* v. *Baldrige*, 655 F. 2d 283 (D.C. Cir. 1981), cert. denied, No. 80-2175 (Oct. 5, 1981); *American Federation of Government Employees, Local 1668* v. *Dunn*, 561 F. 2d 1310, 1312-1313 (9th Cir. 1977); *Rodeway Inns of America, Inc.* v. *Frank*, 541 F. 2d 759 (8th Cir. 1976), cert. denied, 430 U.S. 945 (1977); *Intercontinental Placement Service, Inc.* v. *Shultz*, 461 F. 2d 222 (3d Cir. 1972).

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[2] The court of appeals also affirmed the district court's decision that it lacked subject matter jurisdiction to adjudicate petitioners' claim that the Midland acquisitions violated the Bank Holding Company Act (BHCA). The court reasoned that, even assuming *arguendo* that there had been a violation of the BHCA, challenges under that Act must be presented initially to the Federal Reserve Board, with review thereafter only in the court of appeals. See 12 U.S.C. 1848. Having failed to follow these procedures, petitioners could not present their BHCA claim in the guise of a challenge to the Comptroller's discretion and authority to approve the acquisition (Pet. App. A-22 to A-28).

2. Alternatively, petitioners contend (Pet. 12-14) that this Court should grant review here because the court of appeals misapplied the "zone of interests" test in holding that they lacked standing to challenge the Comptroller's decision in this case. This contention, which involves a construction solely of Wisconsin law that would not apply to suits brought in any other state, is without merit.

a. At the outset, we note that petitioners do not dispute the court of appeals' conclusion that they lack standing to complain that the Comptroller's action violated the federal statutes involved, 12 U.S.C. 181 and 1828(c). As the court of appeals found (Pet. App. A-13 to A-15), Section 181 protects the interests of shareholders and bank customers, and Section 1828(c) is directed specifically at antitrust implications of bank mergers. Petitioners do not fall within the class protected by Section 181, and they do not claim the existence of any antitrust implications of the merger; hence, their claims do not fall within the "zone of interests" protected by these statutes.

Rather, petitioners claim that they fall within the "zone of interests" of Wis. Stat. Ann. § 221.04(1)(j) (West Cum. Supp. 1981), which is made applicable to the Comptroller's actions by 12 U.S.C. 36(c). But the Wisconsin statute itself makes clear that the "failing bank" exception is designed "for the protection of the depositors of the failing bank."

Wis. Stat. Ann. § 221.04(1)(j)2 (West Cum. Supp. 1981). And the Wisconsin Supreme Court has noted recently that the geographical limits contained in the statute "do[] not evince an intent to protect competitors." *Wisconsin ex rel. the First National Bank* v. *M & I Peoples Bank of Colo*~~n~~m*a*, 95 Wis. 2d 303, 311, 290 N.W. 2d 321, 327 (1980). Indeed, the policies underlying the failing bank exception would be seriously undermined if the Comptroller's determination of an emergency were subject to challenge by competitor banks. As the court of appeals explained (Pet. App. A-19), the purpose of the state emergency provision "is to restructure the assets and liabilities of a failing bank with a minimum of disruption of services to depositors." If competitor status is sufficient to permit a bank to challenge the Comptroller's finding of an emergency, this goal of protecting depositors "could be thwarted by the purely selfish desires of competitors to keep a new competitor out of the local banking community" (*ibid.*).

b. Petitioners allege (Pet. 7-8) that the decision below conflicts with several other court of appeals' decisions construing other state statutes and permitting a competitor to challenge the Comptroller's decision to permit the establishment of a branch bank. But the decision below clearly does not hold that a competitor may never challenge the Comptroller's decision to permit the establishment of a branch bank; to the contrary, the opinion specifically refutes that conclusion (Pet. App. A-16). None of the cases cited by petitioners deals with the special circumstance present here—the acquisition of a failing bank in an emergency situation—which involves considerations and statutory policies quite different from those involved when a new branch bank is established. Indeed, petitioners' contention highlights the limited impact of the decision below because none of the cases cited involves a construction of the Wisconsin statute that forms the basis for the court of appeals' decision, and thus the decision below cannot establish a conflict with them.

3. Petitioners also contend (Pet. 14-17) that they have standing to object to the Comptroller's failure to offer them an opportunity to merge with Midland, pursuant to § 221.04(1)(j)2. The court of appeals held, however, that petitioners did not come within the class of banks to which the statute required an offer to be made, because all "the geographical limits" of subdivision 1 would not have been satisfied had they merged with Midland (Pet. App. A-19 to A-21). Accordingly, the court held that petitioners had no basis for challenging the Comptroller's action. While petitioners contend that the court of appeals misconstrued the Wisconsin statute, they point to no decision that adopts their suggested construction. In any event, the precise scope of this offer requirement in the Wisconsin statute is a question of state law that does not warrant this Court's attention. Indeed, as the district court pointed out (Pet. App. B-34), there is some question whether the requirement applies to the Comptroller at all because it is not strictly a "restriction[] as to location" as required by 12 U.S.C. 36(c)(2).[3]

4. Petitioners contend (Pet. 17-19) that the Comptroller's approval of the bank merger violated the Bank Holding Company Act (BHCA), 12 U.S.C. (Supp. IV) 1842(a), because financial assistance rendered to First Bank by its parent holding company allegedly transformed the merger into a holding company acquisition that required Federal

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[3] Moreover, contrary to petitioners' assertion (Pet. 4), the Comptroller gave more than "token recognition" to the offer requirement. The Comptroller specifically determined that "no bank in the Milwaukee area [could] properly be considered a prospective purchaser in these circumstances" (Pet. App. D-14). See also *id.* at D-20 to D-21. And the Comptroller did give petitioner Marshall & Ilsley Bank, which is not a national bank, an opportunity to express an interest in acquiring Midland (*id.* at A-3 n.2).

Reserve Board approval. This contention was correctly rejected by both the court of appeals (Pet. App. A-22 to A-28) and the district court (*id.* at B-17 to B-22).

First, this Court's decision in *Whitney National Bank* v. *New Orleans Bank*, 379 U.S. 411, 419-423 (1965), establishes that a challenge to the legality of a bank holding company action must be brought initially before the Federal Reserve Board. Thus, as the court of appeals noted (Pet. App. A-28), the statute contemplates that "the Board always be the initial judge of BHCA issues," and petitioners could not raise their claim of a violation of the BHCA in a district court suit against the Comptroller. Moreover, the BHCA claim here is insubstantial. The statute specifically provides that no Board approval is required of mergers, consolidations and asset acquisitions consummated by banks that are subsidiaries of holding companies. 12 U.S.C. (Supp. IV) 1842(a)(4) and (5). Thus, under the division of jurisdiction established by Congress, the acquisition here by First Bank comes within the terms of the Bank Merger Act, not the BHCA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1982

Petitioner’s
Reply Brief

No. 81-964

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IN THE

Supreme Court of the United States

October Term, 1981

MARSHALL & ILSLEY CORPORATION, M& I MARSHALL & ILSLEY BANK, THE MARINE CORPORATION, MARINE NATIONAL EXCHANGE BANK OF MILWAUKEE, HERITAGE WISCONSIN CORPORATION and HERITAGE BANK MILWAUKEE, *Petitioners*,

v.

JOHN G. HEIMANN, Comptroller of the Currency of the United States, FIRST BANK (N.A.) and FIRST BANK SYSTEM, INC., *Respondents*.

On Petition For A Writ of Certiorari To The United States Court of Appeals For the Seventh Circuit

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REPLY BRIEF BY MARSHALL & ILSLEY CORPORATION, M & I MARSHALL & ILSLEY BANK, THE MARINE CORPORATION, MARINE NATIONAL EXCHANGE BANK OF MILWAUKEE, HERITAGE WISCONSIN CORPORATION and HERITAGE BANK MILWAUKEE, *PETITIONERS*

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IN THE

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& ILSLEY BANK, THE MARINE CORPORATION,
MARINE NATIONAL EXCHANGE BANK OF MILWAUKEE,
HERITAGE WISCONSIN CORPORATION
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REPLY REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' INTERPRETATION OF STANDING WILL EFFECTIVELY IMPAIR THE RIGHT TO SEEK JUDICIAL REVIEW OF ERRONEOUS, AND EVEN ILLEGAL, ADMINISTRATIVE DECISIONS ON A BROAD SCALE.

Respondents attempt to downplay the significance of the Court of Appeals' decision by claiming that it involves a limited subject matter and statutory construction. Nothing could be farther from the truth. The ruling goes to the very heart of the question of standing to seek judicial review of administrative actions. It ignores the strong presumption and policy favoring judicial review of administrative decisions and adopts a restriction upon review rights which could make review unavailable in a significant number of administrative proceedings. The Court of Appeals' decision has broad ramifications far beyond the immediate issues in this dispute.

To illustrate its impact and why petitioners should have standing in this case, it is only necessary to analyze the following:

A. Petitioners claim the Comptroller's actions violated the *basic* federal and state statutory restrictions prohibiting the creation of a branch bank under the allegations of the Amended Complaint.

B. The Court of Appeals acknowledged that petitioners would have standing and that the Comptroller's actions would be illegal if the *basic* federal and state branch banking prohibitions applied in this matter.[1]

C. The Comptroller justified his actions by claiming that an *exception* to the *basic* branch banking prohibition applied, that petitioners were not within the "zone of interests" protected by this statutory exception, and therefore, petitioners lacked standing to seek review of the administrative action.

D. However, the first claim of the Amended Complaint alleges a factual situation under which the statutory *exception* to branch banking *could not possibly apply* in this case, which allegations must be taken as true since this case is before the Court solely on the pleadings.[2]

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[1] The First Bank respondents again argue (p. 9) that *First National Bank of Wisconsin Rapids v. M&I Peoples Bank of Coloma*, 95 Wis. 2d 303, 290 N.W. 2d 321 (1980) supports the proposition that competing banks are not within the "zone of interests" protected by Wisconsin's branch banking statute. This argument was discussed at length and rejected by the Court of Appeals. Pet. App. A-18 & 19, ftn. 19.

E. Under the present record, the Court of Appeals determined standing, not under the *basic* branch banking prohibition which must apply under the allegations of the Amended Complaint, but rather under the standards of the *exception* to such prohibition despite petitioners' denial that facts exist which permit the exception to apply in this matter.

F. The result is that the Comptroller and First Bank respondents, rather than petitioners, were allowed to frame the issues before the Court of Appeals which formed the basis of foreclosing administrative review of the action taken in this instance.

This concept of the standing doctrine transcends the specific issues in this case. In effect, the Court of Appeals says standing is determined by reference to the statute *which the administrative agency* claims to have followed, not the statute which in fact governs the action. Under this theory, administrators can foreclose judicial review simply by claiming to act under a particular statute, regardless of how ill-founded that claim may be. This bare assertion, even if contested, may effectively thwart review of a false claim. In essence, administrators acquire the power to select the parties who will have standing to challenge agency actions simply by choosing a convenient theory to support such action.

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[2] The Amended Complaint alleges that the former Midland National Bank was not failing; that there was no emergency; and that Midland did not have to be merged or consolidated with another bank to protect depositors. As noted in the petition, petitioners were denied any discovery whatsoever to prove such allegations. Under these circumstances, petitioners object to the "factual" statements to the contrary contained in the opposition brief of the First Bank respondents.

As set forth in the petition, there is an unbroken line of extensive precedent upholding the right of competing banks to obtain judicial review of the Comptroller's decisions regarding the creation of branch banks. The Court of Appeals' decision here is the first and only decision to deny standing in such circumstances. This alone provides ample basis for this Court to assume jurisdiction; but more importantly, the perversion of the standing concept by the Court of Appeals so distorts and cripples traditional concepts of judicial review of administrative action as to cry out for prompt review and reversal by this Court.

II. CONTRARY TO RESPONDENTS' BRIEF, THIS COURT'S RECENT DECISION IN *VALLEY FORGE CHRISTIAN COLLEGE* DID NOT REAFFIRM THE "ZONE OF INTERESTS" REQUIREMENT FOR STANDING.

A further important reason for granting this writ is the need to clarify the "zone of interests" test for standing. Previously, this test has been a most insignificant and easily satisfied element of the basic standing question. Its earlier application expanded, rather than defeated, judicial review. Now, however, respondents and the Court of Appeals would elevate this test to a very major stumbling block for any litigant seeking to challenge administrative action in the courts. This decision should be reversed before it achieves a significance far beyond anything that could be justified by prior decisions of this Court.

Respondents contend that the "zone of interests" requirement for standing was recently reaffirmed in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 50 U.S.L.W. 4103, 4106 (U.S. Jan. 12, 1982). To call that case a reaffirmation of the "zone of interests" requirement is a gross overstatement. While *Valley Forge* makes a brief reference to the "zone of interests" test for standing, that test plays no part in the decision of the case. On the contrary, the case is a strong reaffirmation that the basic test for standing is the fundamental question of *injury*. The Court refers to the "zone of interests" test, along with several other ancillary theories, simply for the purpose of emphasizing that compliance with those tests does not of itself grant standing where there has not been compliance with the basic requirement of injury. The Court then goes on to rule that the plaintiffs in *Valley Forge* had not shown the requisite injury. Thus, the Court had no occasion even to consider whether the "zone of interests" test had any continuing validity or any application to the case. Far from reaffirming the "zone of interests" test, the decision should more properly be regarded as further evidence that the test has been relegated to the background in favor of the fundamental test of injury.

Here, as pointed out in the petition, the Court of Appeals acknowledged that petitioners have standing under the fundamental test of injury and went so far as to label the contrary ruling of the trial court "absurd." However, then the Court of Appeals permitted the Comptroller to define the standing question simply by its choice of a theory to support its action. Because the Comptroller claimed to be acting on behalf of depositors, the Court of Appeals concluded petitioners were outside of the "zone of interests" required to litigate the validity of this branch banking dispute.

Standing should be determined on the basis of the petitioners' claim, not the defense of the respondents. Where the petitioners' claim relies upon a statute designed for their protection, they are within the "zone of interests" and have standing. The fact that the administrative agency may have wrongly claimed to act under some different authority should have nothing whatsoever to do with the standing question. The Court of Appeals' decision here has converted the "zone of interests" test into a shield which limits the normal and proper judicial review of administrative action.

III. CONCLUSION

In summary, the ruling of the Court of Appeals has significance far beyond the parties or the issues in the present litigation. The concepts of standing relied upon by the Court of Appeals would drastically distort the traditional and appropriate approach to standing questions and would seriously undermine the basic right to judicial review of administrative action. The Court of Appeals analyzed the question of standing, not from the viewpoint of the claims asserted by petitioners, but rather from the viewpoint of the defenses asserted by the administrative agency. If this approach prevails, administrative agencies could thwart judicial review simply by adopting theories for their actions which would effectively foreclose the standing of parties most affected and most interested in the agency action. If the basic right to judicial review of administrative action is to be preserved, this distorted application of the concepts of standing must be rejected. The petition for a writ of certiorari should be granted and the decision of the Court of Appeals should be reversed.

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